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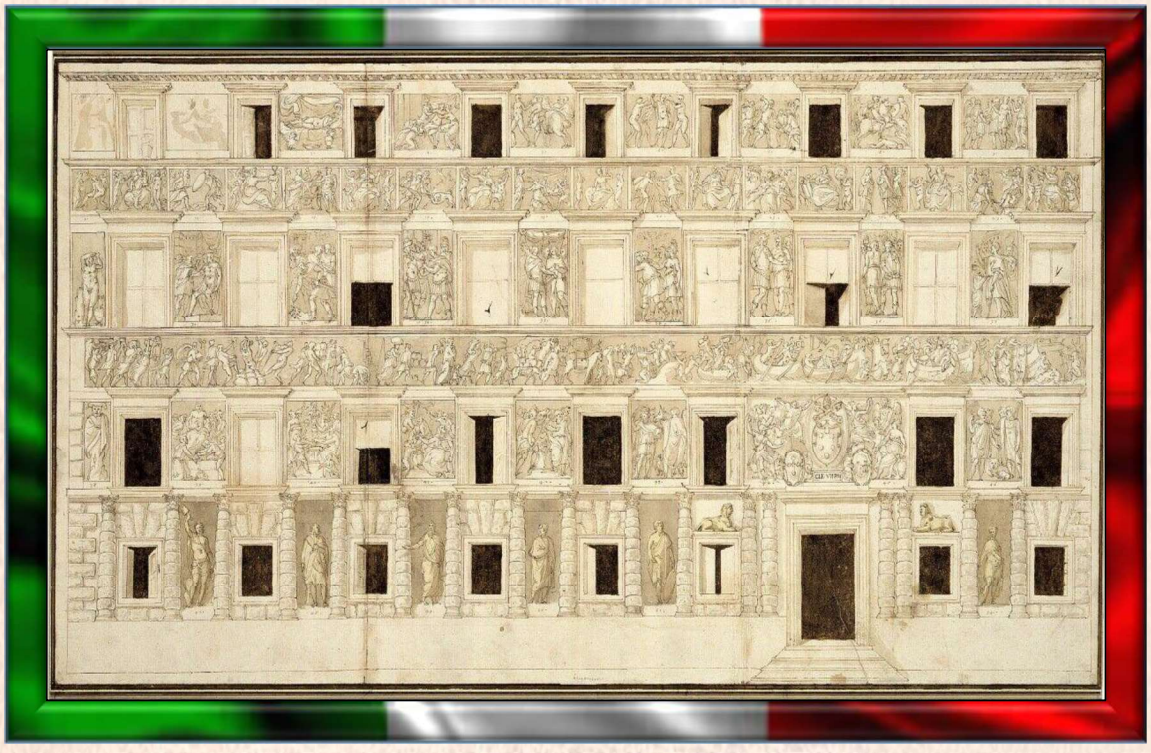

a cura della

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Riassunti – *Abstract*

MAUREEN PATRICIA O'BRIEN, *Gender Perspective in Peacekeeping: the View of the United Nations. (Extract of address given by Major General Maureen O'Brien at the 22nd Conference of the International Society for Military Law and the Law of War - Thursday 12 May 2022 in Florence, Italy).*

Gender is a cross-cutting issue that, if considered consistently and integrated systematically, has the power to make peace and security operations more effective.
Anchored in the 'Women Peace and Security Agenda', integrating a gender perspective into UN Peace Operations is a strategic priority for the UN. A substantial part of our work on gender in peacekeeping relates to increasing gender parity and women's full, equal and meaningful participation in peacekeeping. This includes increasing women's representation in the military component in diverse roles, functions and senior ranks.
We must also integrate a gender perspective into all processes and workstreams of UN Peace Operations to make them gender responsive. It is important to remind ourselves that gender does not equal to women. Everyone benefits from gender equality, the ultimate goal of all gender-related efforts.
It is everyone's responsibility to integrate a gender perspective into one's work. Integrating a gender perspective means analyzing and considering the realities of the diverse roles individuals can have in a given society, and to understand how actions can impact different individuals in different ways. In the Office of Military Affairs, our experience is that integrating gender considerations into our work makes our operations more effective and allows us to better fulfil our mandate. While there are no comparable quantitative studies proving this claim – such as for the private sector – we have qualitative evidence.
We believe that diverse teams are vital to enhance planning and operational effectiveness. We see the benefits of diverse teams across all units at strategic, operational and tactical levels. It is women and men working together in a full, equal and meaningful way that makes diverse teams so successful through new perspectives, solutions and experiences that are brought to the table to unlock greater resources for more effective peacekeeping. But it is not enough to "just add women".
The UN and Troop-Contributing Countries must work to create an organizational environment in which all personnel, regardless of their gender and background, feel empowered, are treated with dignity and respect, and are given equal and fair opportunities to contribute their full potential to peacekeeping operations.
We are all responsible for the creation of an inclusive and enabling work environment. It is important that all peacekeepers are aware of this responsibility. Diversity will not lead us far, without inclusivity.

MAUREEN PATRICIA O'BRIEN, Prospettiva di genere nel mantenimento della pace: la posizione delle Nazioni Unite.
(Estratto dal discorso tenuto dal *Maj. Gen.* Maureen O'Brien alla 22ª Conferenza della *International Society for Military Law and the Law of War* - giovedì 12 maggio 2022, Firenze, Italia).

Il genere è una questione trasversale che, se considerata e sistematicamente integrata, ha il potere di rendere più efficaci le operazioni di pace e di sicurezza.
Ancorata all'"Agenda per la pace e la sicurezza delle donne", l'integrazione di una prospettiva di genere nelle operazioni di pace delle Nazioni Unite è una priorità strategica per le Nazioni Unite. Una parte sostanziale del nostro lavoro sul genere nel *peacekeeping* riguarda

l'aumento della parità di genere e la partecipazione piena, equa e significativa delle donne al mantenimento della pace. Ciò include l'aumento della rappresentanza delle donne nella componente militare in diversi ruoli, funzioni e gradi *senior*.
Dobbiamo anche integrare una prospettiva di genere in tutti i processi e flussi di lavoro delle Operazioni di pace delle Nazioni Unite per renderli sensibili al genere. È importante ricordare a noi stessi che il genere non equivale alle donne. Tutti beneficiano dell'uguaglianza di genere, l'obiettivo finale di tutti gli sforzi legati al genere.
È responsabilità di tutti integrare una prospettiva di genere nel proprio lavoro. Questo significa analizzare e considerare le realtà dei diversi ruoli che gli individui possono avere in una data società e capire come le azioni possono avere un impatto su individui diversi in modi diversi. Nell'*Office of Military Affairs*, la nostra esperienza è che l'integrazione delle considerazioni di genere nel nostro lavoro rende le nostre operazioni più efficaci e ci consente di adempiere meglio al nostro mandato. Sebbene non ci siano studi quantitativi comparabili che dimostrino questa affermazione, come per il settore privato, abbiamo prove qualitative. Riteniamo che *team* diversificati siano vitali per migliorare la pianificazione e l'efficacia operativa. Vediamo i vantaggi dei *team* compositi in tutte le unità a livello strategico, operativo e tattico. Sono le donne e gli uomini che lavorano insieme in un modo pieno, equo e significativo che rende i *team* misti così vincenti attraverso nuove prospettive, soluzioni ed esperienze che vengono portate al tavolo per sbloccare maggiori risorse per un mantenimento della pace più efficace. Ma non basta "aggiungere solo donne".
Le Nazioni Unite e gli Stati che contribuiscono con le truppe devono lavorare per creare un ambiente organizzativo in cui tutto il personale, indipendentemente dal sesso e dal *background*, si senta pienamente legittimato, sia trattato con dignità e rispetto e abbia pari ed eque opportunità di contribuire con il proprio pieno potenziale al raggiungimento della pace.
Siamo tutti responsabili della creazione di un ambiente di lavoro inclusivo e favorevole. È importante che tutti i *peacekeeper* siano consapevoli di questa responsabilità. La diversità non ci porterà lontano, senza l'inclusività.

ENRICO COSSIDENTE, *Disinformation and the (Ab)Use of International Law*.

Disinformation is currently a hot topic of international law. It is, however, nothing completely new as in the past States and scholars already discussed the negative impacts of what at the time was called propaganda. The article follows the historic path of the issue, explains the current position of international lawyers on the topic and offers a different point of view on how disinformation relates to international law. As the spread of information that is false or misleading is not in itself contrary to the law, the violation does not lie in dis-informing an audience but in the willingness of States to abuse international law. This principle of international law is introduced through the discussion that involves its supporters and critics.

Keywords: public international law, disinformation, abuse of rights, general principles of international law, history.

Disinformazione e (ab)uso del diritto internazionale.

La disinformazione è un tema attuale del diritto internazionale. Non è, tuttavia, qualcosa di completamente nuovo in quanto già in passato Stati e studiosi hanno discusso dell'impatto negativo che aveva quella che all'epoca si chiamava propaganda. L'articolo segue il percorso storico sul tema, spiega l'attuale posizione dei giuristi internazionali sull'argomento ed offre un nuovo punto di vista diverso su come la disinformazione si rapporti al diritto

internazionale. Poiché la diffusione di informazioni false o forvianti non è di per sé contraria alla legge, la violazione non risiede nella disinformazione di un pubblico, ma nella volontà degli Stati di abusare di un diritto. Il principio dell'abuso di diritto, nel contesto del diritto internazionale, viene introdotto presentando il dibattito che coinvolge i suoi sostenitori ed suoi critici.

Parole chiave: diritto internazionale, disinformazione, abuso di diritto, principi generali del diritto internazionale, storia.

MARIAVALERIA DEL TUFO, Crimini di guerra e prospettive di riforma.

L'autore propone una lettura "dall'interno" dei lavori della Commissione istituita dalla Ministra della Giustizia Marta Cartabia per l'elaborazione di un Progetto di Codice dei crimini internazionali, con un focus particolare sulla riorganizzazione dei crimini di guerra e sulla complessa problematica relativa all'individuazione della magistratura (ordinaria o militare) cui attribuire la giurisdizione in materia.

Parole chiave: adeguamento allo Statuto di Roma, progetto di codice, crimini internazionali, crimini di guerra, la giurisdizione.

War Crimes and Prospects for Reform.

The author advances an 'insider's analysis' of the work of the Committee recently set up by Minister of Justice Marta Cartabia to prepare a Draft Code of International Crimes. The focus is both on regulating war crimes and identifying which court, ordinary or military, should have jurisdiction in the matter.

Keywords: adaptation to the Rome Statute, draft code, international crimes, war crimes, jurisdiction.

FEDERICA FAVUZZA, *International Humanitarian Law, Gender, and Detention in Armed Conflict.*

This article aims to examine international humanitarian rules regulating the treatment of detainees with a view to determining whether they take or may be interpreted as taking various gender issues into account. After defining relevant terms and clarifying the rationale underlying the investigation, the article will, first, identify the few IHL treaty-based rules that expressly recognise the specific needs and circumstances of female detainees. Second, the research will show how certain IHL obligations may justify or even demand a gender-sensitive interpretation and application of other IHL rules concerning the treatment of detainees.

Keywords: gender, detention, treatment of detainees, women, international humanitarian law, armed conflict.

Diritto internazionale umanitario, genere, e detenzione nei conflitti armati.

Il presente contributo si propone di esaminare le norme di diritto internazionale umanitario volte a disciplinare il trattamento delle persone private della libertà in un conflitto armato allo scopo di stabilire se tali norme prendano in considerazione questioni di genere o se possano essere interpretate in tal senso. Dopo avere definito alcune nozioni rilevanti e chiarito l'ambito della ricerca, l'articolo individuerà, dapprima, le poche norme convenzionali

che riconoscono esplicitamente i bisogni e le circostanze specifiche delle donne private della libertà. La ricerca mostrerà, poi, come alcuni obblighi di diritto internazionale umanitario possano giustificare o addirittura richiedere un'interpretazione e applicazione di altre norme sul trattamento delle persone private della libertà che tengano conto delle questioni di genere.

Parole chiave: genere, detenzione, trattamento dei detenuti, donne, diritto internazionale umanitario, conflitti armati.

MARISA GIUSTINIANI*, The Legality of Targeting Practices against War-Sustaining, Economic Objects.*

Contemporary warfare gives rise to new challenges for the application of the principle of distinction, which protects civilian objects and persons from attack by demarcating them from military objectives. Attacks against 'war-sustaining' targets, namely economic contributions to enemy forces' ability to sustain military efforts, constitute an especially contentious frontier of contemporary military operations. A known example of 'war-sustaining' attacks concerns the 2015 military operations conducted by the United States and others against the Islamic State's oil revenues. The debate on the legality of such attacks is structured along two opposite poles due to diverging interpretations of what constitutes a legitimate military objective. I analyze these interpretative differences by identifying the two opposing sides of the debate: the widely supported 'Opposite to United States' interpretation and the United States' position. The US' interpretation is more expansive and furthers the legality of attacks against the war-sustaining capacity of armed non-state actors such as the Islamic State. However, this perspective risks construing nearly all civilian activities as indirect contributions to the war effort. Perhaps, the best available solution is to conduct law enforcement operations against armed groups' war-sustaining revenues within the framework of domestic and human rights law.

Key words: Conduct of Hostilities, Law of Targeting, War-Sustaining Objects, Military Objectives, Islamic State oil revenue.

La legalità delle pratiche di *targeting* contro le risorse economiche di sostegno alla guerra.

Le guerre contemporanee pongono nuove sfide anche in ambito giuridico e, tra queste, una di quelle più impegnative concerne l'applicazione in concreto del principio di distinzione tra obiettivi militari ed obiettivi civili, proteggendo dagli attacchi persone ed oggetti appartenenti a questa seconda categoria. In particolare, occorre riflettere sulla legittimità o meno degli attacchi nei confronti dei "*war-sustaining targets*", ovvero nei confronti delle risorse economiche finalizzate a sostenere e rafforzare le capacità militari di una delle forze in conflitto. L'articolo affronta la questione non solo dal punto di vista teorico ma partendo dalle operazioni condotte nel 2015, da Stati Uniti e Paesi alleati, contro le entrate petrolifere dell'*Islamic State*. Il dibattito sulla legalità di tale tipologia di attacchi si incentra su due opposte interpretazioni del concetto di "legittimo obiettivo militare", che l'articolo analizza dettagliatamente. Da un lato viene riportata l'interpretazione più espansiva, fatta propria dagli Stati Uniti, caratterizzata dalla tesi che riconosce piena legittimità agli attacchi contro le capacità finalizzate a sostenere il soggetto in guerra; dall'altro la tesi di coloro che evidenziano come questa prospettiva rischia di legittimare gli attacchi rivolti contro quasi tutte le attività di natura civile, che indirettamente possono essere sempre qualificati come aiuto allo sforzo bellico. L'autore prospetta una soluzione che riconduce le operazioni di contrasto alle entrate economiche dei gruppi armati, piuttosto che ai principi del diritto

internazionale bellico, alle norme di diritto interno, fermo restando l'obbligo di tutelare i diritti umani dei soggetti in concreto coinvolti.

Parole chiave: condotta delle ostilità, legge sul *targeting*, oggetti di sostegno alla guerra, obiettivi militari, entrate petrolifere dello Stato islamico.

JEAN PAUL PIERINI, *Grand Spymasters Operating from their Home Country and the Exercise of Extraterritorial Criminal Jurisdiction: Politically Motivated Restraint and Rule of Law.*

The Paper takes note of the emerging practice of indicting foreign officials for cyber-espionage and hacking from across the borders and observes that, by contrast traditional old-fashioned "trench coat espionage" hard work involving the inducement of officials to betray – often in exchange of bribes - violating obligations and fidelity owed to their Country, continue to have a relatively smaller "judicial footprint". While there are no limits to the prosecution of traitors, "official spies" are mainly arrested, released, expelled and (apparently) never sought again and those in upper positions in the intelligence chain of command unnamed and free to plan for a happy retirement. The question raised by the emerging practice in respect of "cyber espionage" is the political and judicial landscape has changed, new rules have emerged or simply if something went missed in the past. The purpose of the presentation is, accordingly, to explore the limits - if any - of the exercise of extraterritorial jurisdiction in respect of high-ranking officials of foreign agencies sitting in their office beyond borders, often thousands miles away, because of their ordering, directing, authorising or aiding espionage taking place "on the field" … which means in the target Country.

Keywords: Espionage, Treason, Cyber, Extraterritorial jurisdiction, Extradition, Political offense.

Lo spionaggio, i gran capi delle organizzazioni spionistiche che operano dal proprio Stato e l'esercizio della giurisdizione penale: moderazione determinata da ragioni politiche e regole dello Stato di diritto.

Lo studio, nel prendere atto della pratica emergente di incriminare funzionari stranieri per spionaggio informatico e pirateria informatica condotta da remoto e oltre i confini nazionali, muove dall'osservazione per la quale, al contrario, lo "spionaggio tradizionale" condotto da agenti e che coinvolge l'induzione dei funzionari a tradire, spesso in cambio di tangenti violando obblighi di fedeltà, continua ad avere una "impronta giudiziaria" relativamente minore. Sebbene non ci siano limiti al perseguimento dei traditori, i mandanti che sono ai vertici degli apparati stranieri rimangono senza nome e liberi di pianificare il proprio felice pensionamento. La questione sollevata dalla pratica emergente rispetto al "*cyber* spionaggio" è se il panorama politico e giudiziario è cambiato, se sono emerse nuove regole o più semplicemente se qualcosa è sfuggito in passato. Lo scopo dello studio è, di conseguenza, quello di esplorare i limiti dell'esercizio della giurisdizione extraterritoriale nei confronti di alti funzionari di agenzie straniere che siedono nel loro ufficio oltre i confini, spesso a migliaia di chilometri di distanza, per aver ordinato, diretto, autorizzato o agevolato lo spionaggio che si svolge "sul campo" … il che significa nel Paese colpito.

Parole chiave: Spionaggio, Tradimento, *Cyber*, Giurisdizione extraterritoriale, estradizione, Reato politico.

MATTEO WINKLER, *A Glance at the Margins: A Queer Eye on the Law of Armed Conflict.*

This article explores the queer dimensions of the laws of armed conflicts. Queering this law means to question its traditional dichotomic foundations (combatants/civilians, peace/war, male/female, homosexual/heterosexual, etc.) and subsequently discuss how non-cisgender and non-heterosexual bodies are marginalized, even erased, from armed conflict contexts. To this end, this article addresses three issues pertaining to the LOAC which challenge the common assumption that such law has no say about queer bodies and lives: the queer military ban, the prosecution of male-to-male and forced rape, and queer persecution under the law of occupation.

Keywords: law of armed conflict, international human rights law, international criminal law, sex crimes, law of occupation.

Uno sguardo ai margini: una prospettiva *queer* del diritto di guerra.

Questo articolo esplora le dimensioni *queer* delle leggi dei conflitti armati. Interrogare questa legge significa mettere in discussione i suoi tradizionali fondamenti dicotomici (combattenti/civili, pace/guerra, maschio/femmina, omosessuale/eterosessuale, ecc.) e successivamente discutere di come i corpi *non-cisgender* e non-eterosessuali siano emarginati, persino cancellati, dal contesto dei conflitti armati. A tal fine, questo studio affronta tre questioni relative al LOAC che sfidano l'assunto comune secondo cui tale legge non ha voce in capitolo su corpi e vite omosessuali: il bando dei militari omosessuali, il perseguimento degli stupri da uomo a uomo e la persecuzione degli omosessuali secondo la legge dell'occupazione.

Parole chiave: *legge sul conflitto armato, diritto internazionale dei diritti umani, diritto penale internazionale, crimini sessuali, Legge del lavoro.*

Gender Perspective in Peacekeeping: the View of the United Nations[*]

Prospettiva di genere nel mantenimento della pace:
la posizione delle Nazioni Unite

Maureen Patricia O'Brien

Good morning to you all, Prof. Dr. Venturini, distinguished panelists, and guests. It is my great pleasure to be here with you today to speak on behalf of the United Nations, to engage in a discussion on international peace and security, and to exchange ideas. I am honored to be invited to this panel discussion alongside experts from practice and academia.

This week's conference is on exploring opportunities for improvement of international peace and security and I am pleased to see that gender was considered on the conference's agenda. Let me tell you that there are indeed many opportunities to be explored and seized when it comes to gender and peace and security. While I did not have the chance to attend all panels this week, I am certain that gender considerations informed previous panel discussions as well, and that gender was not solely covered by this panel. Gender is a cross-cutting issue that – if considered consistently and integrated systematically – has the power to make peace and security operations more effective.

I want to start off by sharing a small anecdote on one of my recent speaking engagements. You can imagine that as the first-ever woman Deputy Military Adviser in the Office of Military Affairs within the UN Department of Peace Operations, there are many speaking engagements I am invited to. Recently, I was invited to speak on a panel to enlighten the audience on the use of women as a fundamental tool in military operations. It is to no surprise that in a sector in which women are bluntly instrumentalized and "allowed" to participate, I often get invited because of my "being a woman" first, and then for my military expertise and experience. Every first woman – in any role, really – who broke the barriers, glass ceilings, jumped over glass cliffs – is undeniably under higher scrutiny than a male colleague in a comparable position. This is something I experienced throughout my career, which is interesting, considering evidence that shows that women who make it to leadership positions, are often more qualified and skilled that their male counterparts[1]. Similarly, my male colleagues are usually not invited to reflect on gender perspectives. This seems to be a task still reserved for women, which limits any potential for meaningful institutional change considering that the military sector is still heavily male-dominated, especially in higher-rank positions. So, I would like to start off by saying that today, I am not here as a gender expert. What I can offer you today is an insight into the UN's organizational perspective on gender in peacekeeping, and some personal anecdotes of the many years I worked in peace and security.

For the United Nations, integrating a gender perspective into UN Peace Operations is a strategic priority. Anchored in the Women, Peace and Security Agenda – constituted by landmark resolution 1325 (2000) and consecutive resolutions – the different components – military, police, justice and corrections, and the civilian component – work to increase women's participation in peace processes and conflict resolution, protect women and girls, prevent violence against them, and assure that the needs of women and girls are met when it comes to relief and recovery. The WPS Agenda and its strategic priorities are further anchored in the Action for Peacekeeping (A4P) Initiative and its continuation A4P+, through shared commitments of Member States.

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[*] Extract of address given by Major General Maureen O'Brien at the 22nd Conference of the International Society for Military Law and the Law of War - Thursday 12 May 2022 in Florence, Italy.

[1] This is famously known as the The Jackie (and Jill) Robinson Effect: https://www.jstor.org/stable/23024932?seq=1#metadata_info_tab_contents.

Related to the WPS Agenda, a substantive part of our work on gender in peacekeeping relates to increasing gender parity and women's full, equal and meaningful participation in peacekeeping. This includes increasing women's representation in the military component in diverse roles, functions and ranks, something the Office of Military Affairs is working tirelessly with Troop-Contributing Countries to achieve. For this purpose, in 2018 the Secretary General launched the Uniformed Gender Parity Strategy, which sets yearly gender parity targets for the different components and personnel categories.

To implement the WPS Agenda and achieve gender parity, we must integrate a gender perspective into all processes and workstreams of UN Peace Operations, to make these gender responsive. It is important to remind ourselves that gender does not equal to women. It is much more than that. Integrating a gender perspective means analyzing and considering the realities of the diverse roles individuals can have in a given society, and to understand how actions can impact different individuals in different ways. Men, women, girls, boys, and other gender identities. While it is true that a heavy focus is placed on considering the needs of women and girls, we must understand that this focus is necessary, given the fact that historically, the perspectives of women and girls have been systematically marginalized and often ignored. Something that colleagues – particularly in the peace and security field – often get wrong, is that gender mainstreaming exclusively benefits women and that men will lose out in return. This is incorrect. Everyone benefits from gender equality; the ultimate goal of all gender-related efforts.

For us in the Office of Military Affairs, we experienced that integrating gender considerations into our work, makes our operations more effective and allows us to better fulfil our mandate. While there are no comparable quantitative studies proving this claim – such as exist for the private sector – we have qualitative evidence of this matter, and I would like to highlight some examples.

First, our primary mandate is to protect civilians. For this, it is essential to consider all parts of the local population and understand the gender roles and norms present in local communities that can for instance inform daily movement patterns. Let's take farming for an example. While in many societies women are not allowed to *own* land, women are often the ones who work on the land. Assuming that men as the owners of the land would be the ones who would need to be informed about potential attacks in a specific area in which farming is the primary livelihood, might leave women working on the fields in great danger, if information is not passed on to them.

Second, understanding gender dynamics in the communities we serve is also vital to comprehend how stereotypical gender roles and norms can be exploited by armed actors to deceive the enemy. Women can join armed groups and become fighters or smugglers, often incognito, under the cover of being weak and vulnerable. In this way, understanding that women can have diverse roles and are not always only victims can become crucial for protection of civilians and the force.

Third, integrating gender considerations is also vital when it comes to creating sustainable peace. Gender roles and norms can change through conflict. It is important to take this into consideration when designing programs for peace and security. For instance, let's consider women who were forced to become the single heads of household due to their husbands leaving to fight and join armed groups. While this situation likely puts women in a position of greater vulnerability, it can also empower them, as they are faced with the need to make all decisions of the household by themselves. So, what happens now with the household dynamics once the husbands return? In countries in which hypermasculinity is the norm, are we to observe greater levels of gender-based violence, given the change in power dynamics? What effect would this have on an aggregate level on the overall situation of peace and stability in a country? All these are gender-related questions and considerations that are significant to increase effectiveness of operations in support of the communities we serve and establish lasting peace and security. By the way, this also applies to household dynamics of military personnel more generally. In the Irish Armed Forces, military

personnel are sensitized to such possible changes in household dynamics in their pre-deployment training.

In the military component of UN Peace Operations, we understand that it is everyone's responsibility to integrate a gender perspective into one's work. To assist colleagues with this task in the Office of Military Affairs and in the missions, we have a network of military gender advisers and focal points. A big part of the work of these military gender teams is to conduct mandatory training and advise military personnel. In the Office of Military Affairs, we are developing guidance material and training on how to integrate a gender perspective into the military component, such as a Case-Study Handbook on Gender, Peace and Security. We have noticed that there is a need for practical training resources on this field that explain, in actionable terms, what gender-considerations mean. Gender theory can sometimes be quite difficult to translate into the military context. But I am sure my colleague Major Vincenza Chiacchierini will elaborate further on this in her intervention on training.

On gender parity, the UN is working with Member States to increase the number of women across different roles and in leadership positions through outreach to Troop-Contributing Countries, TCCs, and requests for nominations. For example, we are sending out monthly gender parity reports clearly reminding TCCs on where they stand against the Uniformed Gender Parity Targets with their contributions, and communicating publicly which TCCs are on track, to incentivize exchange of best practices among TCCs. The Office of Military Affairs has also clearly communicated to TCCs that individual posts will be reallocated to those TCCs that achieve the target. Furthermore, we are implementing a project to gain a better understanding of barriers faced by uniformed women in peace operations, through a uniformed survey. We are following the lead of a number of Member States which have undergone or are currently undergoing similar exercises through barrier assessments. In these efforts, we are also working closely with the Elsie Initiative Fund for Women in Peacekeeping. We also work closely with Member States to learn from their good practices and experiences in addressing root causes of inequalities and promoting women's meaningful participation in national security sectors and consequently in uniformed components of peace operations. Having an evidence base is crucial for Member States and the UN alike to be able to design informed actions and address challenges that women themselves have identified.

We believe that diverse teams are vital to enhance planning and operational effectiveness. While the evident example often quoted on why diverse teams are important, comes from community engagement and the fact that these teams will allow to engage diverse groups in the population, we see the benefits of diverse teams across all units, at strategic, operational and tactical level. It is women and men working together in a full, equal and meaningful way what makes diverse teams so successful through new perspectives, solutions and experiences that are brought to the table to unlock greater resources for more effective peacekeeping. But it is not enough to "just add women". The UN and TCCs must work to create an organizational environment in which all personnel, regardless of their gender and background, feel empowered, are treated with dignity and respect, and are given equal and fair opportunities to contribute their full potential to peacekeeping operations.

Unfortunately, there is still a long way to go, until we have fully integrated a gender perspective into UN Peace Operations. A key challenge that remains are gender stereotypical mindsets. Such mindsets are often in the way of initiatives that aim to make operations gender-responsive and are creating a harmful work environment and barrier for gender parity in UN Peace Operations. The number of women in the military component is still low; with only about 6% women in contingents and 21,5% of women as Individual Uniformed Personnel. We further see challenges in the representation of women in diverse roles, and ranks. A key challenge to having more women in traditionally underrepresented positions and leadership, remains that there are only few women in national militaries that have the required rank and qualifications for such positions, as in many

militaries women were only allowed to assume all roles and functions since a couple of years, such as the infantry. The point of departure is not equal.

Women often must work harder to be formally recognized, nominated, and promoted. At a national level and in missions, leadership must assign qualified and trained women and men to the roles and responsibilities that correspond to their professional capabilities and not to stereotypically supposed qualities or skills. Leaders can challenge deep-rooted patriarchal beliefs and norms by lifting women up, giving them responsibility, highlighting their contribution, and advocating for their promotion. That said, we are all responsible for the creation of an inclusive and enabling work environment. It is important that all personnel are aware of this responsibility. Diversity will not lead us far, without inclusivity.

Albeit the challenges that remain, I believe that we are on a good path. Awareness is the first step towards change, and it is impossible to ignore the importance of gender considerations for peace and security. The United Nations is doing their part to make UN Peace Operations gender responsive. I can only encourage Member States to continue the same path.

Thank you

Disinformation and the (ab)use of international law[*]

La disinformazione e l'(ab)uso del diritto internazionale

Enrico B. Cossidente

Summary: 1. Introduction. – 2. A historical approach to propaganda. – 3. General international law. – 4. Is a different approach possible? – 5. Conclusions.

1. Introduction

Disinformation[1] is a complex phenomenon that has been analyzed in the past mainly by scholars in the field of sociology, political and communication science. With the exclusion of some[2], only after the 2016 US presidential election the legal community has found interest in the topic. Actually, there are different approaches as to whether and how international law applies to disinformation. Scholars have no doubt that such type of actions affect the law either internationally or domestically. With respect to international law they are divided between those who analyze the matter from a general international law perspective and those who do so from a human rights law prospective. The members of the first group are fragmented between those who think that disinformation affects sovereignty, others who analyze the due diligence aspect of it and finally those who think that disinformation is a violation of the principle of self-determination.

The second group shows more cohesion because it believes that disinformation violates various human rights provisions protected by treaty[3].

In light of the above the focus of this paper will solely be on disinformation conducted by States under general international law. The first section will be giving an historical survey on the topic, while presenting in the second one the various positions held by international law scholars with reference to disinformation. The third section will then give an overview on abuse of right and the conclusion will offer some final thoughts on the applicability of abuse of rights to disinformation activities conducted by States.

[*] This article reflects a presentation given at the twenty-second congress of the International Society for Military Law and the Law of War (ISMLLW) held in Palazzo Vecchio, Florence, between May 10 and 14, 2022.
The views expressed in this article are those of the author and do not reflect the views of the Italian Army, the Ministry of Defense or the Italian Government.

[1] It outside the scope of this article to concentrate on the debate about the definition of disinformation, but for methodological purposes here the term disinformation will be considered as "information that is deliberately false or misleading" a definition by Caroline Jack in her Lexicon of Lies, Data and Society research institute, August 9, 2017, p. 3, available at https://datasociety.net/library/lexicon-of-lies/. On the other hand, Milanovic and Schmitt prefer to use the term misinformation "as any false item of information that is directly or indirectly relevant to the pandemic. One can also speak of disinformation, a term that implies intentionality on the part of the originator or the spreader of false information. We prefer to use misinformation as a broader term", Marko Milanovic and Michael N. Schmitt, Cyber Attacks and Cyber (Mis)information Operations During a Pandemic, Journal of National Security Law & Policy, vol. 11(1), 2020, text of note 87 at p. 266.

[2] Notably Prof. Jacob Rowbottom who researched the topic for years before it became "fancy", see personal page at Oxford University https://www.law.ox.ac.uk/people/jacob-rowbottom.

[3] Clearly there are nuances e.g. the different approaches taken by Milanovic and Schmitt on the extraterritorial application of human rights law, see Marko Milanovic and Michael N. Schmitt, supra note 1.

2. A historical approach to propaganda[4]

States have always been confronted with the issue of unwanted communication coming from abroad. Even then the position on the topic was not clear[5]. This article will avoid to go too far into the past and will start from the French revolution.

In 1792 the French "National Assembly issued a decree encouraging revolt abroad by providing that France would grant fraternity and aid to all peoples wishing to recover their liberty"[6]. In 1793 the law was repealed after the protest of the United Kingdom[7]. Between the two World Wars the Soviet Union included various types of anti-propaganda provisions in its bilateral agreements[8].

In 1936 some States became party to the Convention concerning the use of broadcasting in the cause of peace[9]. The aim clearly was to try to control the spreading of propaganda through radio, a new mean of communication that was changing the media landscape at the time. The waives of this new device were crossing States borders allowing for information to reach peoples that paper could not. The Convention was never impactful as States doubted its applicability[10]. The document has provisions that are not acceptable today such as the prohibition of broadcasting and

[4] As Stated before also in the historical analysis of this phenomenon the actions of non-State actors (or private persons) will not be taken into consideration even if it has been the subject of heated debates between States with the exception of the UK and the US. Although the latter "in 1933 [..] imputed responsibility to the Soviet Union for anti-American propaganda circulated by private persons or groups. The Soviet Union denied responsibility for such actions", ELIZABETH A. DOWNEY, *A historical survey of the international regulation of propaganda, Michigan Yearbook of International Legal Studies, vol. 5*, 1984, p. 342.
The term propaganda is used as a synonym of disinformation. The word identified in the past negative actions conducted by States. Indeed propaganda tries "to manipulate the minds of the "target" audience in pursuit of an objective often hidden in the mind of the communicator" who "is not interested in the truth as such but instead uses it to accomplish some definite end", John B. Whitton, The problem of curbing international propaganda, Law and Contemporary Problems, vol. 31, 1966, p. 601.

[5] V. VAN DYKE, *The Responsibility of States for International Propaganda, American Journal of International Law, vol. 34*, 1940, p. 60 (from now on: Van Dyke, Responsibility of States). For Elizabeth A. Downey "[c]ostumarily, States agree not to spread propaganda hostile to the governments of friendly foreign countries. At the same time, States have continually violated that law, leaving the status of the international custom in confusion", op. cit., p. 341.

[6] V.VAN DYKE, *Responsibility of States*, at p. 61.

[7] Ibidem. The opinion of the other States at the time was that the simple existence of a non-monarchial State constituted an interference in their affairs. With the exception of the UK this approach was acknowledged by France as after the revolutions of 1830 and 1848 it declared it would not interfere with other States. Van Dyke, Responsibility of States, at p. 61-62.

[8] Supra note 4, at p. 343.

[9] International Convention Concerning the Use of Broadcasting in the Cause of Peace, Sept. 23, 1936, 186 L.N.T.S. p. 301, n. 4319 (from now on the Convention). Twenty-eight States signed the Convention, only nineteen ratified/accessed it between 1937 and 1938. Other accessed it later in time while four (Australia, France, the Netherlands and the UK) denounced it (data retrieved from https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280046246&clang=_en). The UK is an emblematic case as it was one of the first signatories and ratified the Convention in 1937, notwithstanding its strong position concerning freedom of expression/speech.

[10] Belgium declared that "improper transmissions emanating from another country, in so far as such a right exists in conformity with the general provisions of international law and with the Conventions in force, is in no way affected by the Convention", supra note 9 at p. 314. A similar declaration was given by the Soviet Union stating that it would have applied the Convention on reciprocity with other States, supra note 9 at p. 317. By ratifying the Convention the USSR declared that "any dispute that may arise regarding the interpretation or application of the Convention which has not been settled by means of negotiations shall be submitted to arbitration or to judicial settlement at the request of one of the Parties, and declares that, for the submission of such a dispute to arbitration or to judicial settlement, the agreement of all Parties to the dispute shall be essential in every separate case" (see USSR reservation upon ratification available at https://treaties.un.org/doc/Publication/UNTS/Volume%201299/volume-1299-C-4319-English_French.pdf). Finally Spain declared that it would "put a stop by all possible means to propaganda liable adversely to affect internal order in Spain and involving a breach of the convention, in the event of the procedure proposed by the convention not permitting of immediate steps to put a stop to such breach", supra note 9 at p. 315.

the stopping of the transmission of information that might harm the security of others States and takes place in the territory of the Parties. The Convention also obliges States to verify if its stations broadcast accurate information[11]. The same applies to the requirement for the Parties to issue national guidance for privately owned broadcasting services[12], something that today might amount to State interference in freedom of the media.

Emblematic is the position of the US during World War I. In that period President Wilson's executive orders[13] applied strictly the law of neutrality[14] although this caused a limitation in the free flow of information in the context of an international armed conflict[15]. This position was coherent with the Supreme Court decision[16] of the same period on issues pertaining to the First Amendment of the US constitution[17]. The approach of the US Supreme Court will change over time accepting the marketplace of ideas principle presented by Justice Homes in a famous dissenting opinion[18]. For Holmes

> «*the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution […] I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country*[19]».

At the end of the second World War the international community was still interested in disinformation, although it was not addressed explicitly in the UN Charter. Yugoslavia proposed «[r]ecommendations to be made with a view to preventing the dissemination with regard to foreign States of slanderous reports which are harmful to good relations between States and contrary to the purposes and principles of the United Nations[20]». For this end in 1946 "the General Assembly of the United Nations received a Philippine proposal to hold a world-wide conference on freedom of information"[21]. The conference held in Geneva in 1948 was concluded with four draft conventions[22]

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[11] Supra note 9, articles 1-5.

[12] Ibidem, article 6.

[13] Act of August 13, 1912, 37 Stat. 302, 303; Foreign Relations of the United States 668, 678 (Supp. 1914).

[14] Articles 3, 5, 8 and 9 of the Hague convention (V) of 1907 respecting the rights and duties of neutral powers and persons in case of war on land.

[15] Supra note 4 at p. 6 and p. 353.

[16] John Hessin Clarke and Supreme Court of the United States. U.S. Reports: Abrams v. United States, 250 U.S. 616. 1919. Periodical. Retrieved from the Library of Congress www.loc.gov/item/usrep250616/.

[17] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" available at https://constitution.congress.gov/constitution/amendment-1/.

[18] Supra note 18, at p. 624.

[19] Ibidem, at 630.

[20] J. B. WHITTON, *Efforts to Curb Dangerous Propaganda, American Journal of International Law, vol. 49, 1947, p. 899 citing the UN Weekly Bulletin, September 16, 1947, p. 369. See also Elisabeth A. Downey, op. cit., note 44 at p. 356.*

[21] S. P. LÓPEZ, Freedom of Information: a report on contemporary problems and developments, with recommendations for practical action, UN Economic and Social Council, 16th session, supplement no. 12, 6 May 1953, p. 7, available at https://tind-customer-undl.s3.amazonaws.com/ebb5a60a-0120-4bd3-aae8-0e748bd3b6f6?response-content-disposition=attachment%3B%20filename%2A%3DUTF-8%27%27E_2426-EN.pdf&response-content-type=application%2Fpdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Expires=86400&X-Amz-Credential=AKIAXL7W7Q3XFWDGQKBB%2F20220712%2Feu-west-1%2Fs3%2Faws4_request&X-Amz-SignedHeaders=host&X-Amz-Date=20220712T141845Z&X-Amz-Signature=4733f23dce5f1e3b7d9d9256c578cafdff13d977f922e8bbfb44615114f271f5. See also John B. Whitton, supra at 20, p. 901 and Elisabeth A. Downey, op. cit., notes 44-45 at p. 356.

[22] Draft convention on the gathering and international transmission of news; draft convention concerning the institution of an international right of correction; draft convention on freedom of information.

and a draft declaration and draft covenant on human rights[23]. Although these conventions did not enter into force the draft one on freedom of information proposed a new approach as it recognized that people should be free to impart and receive information. Because this right had to be conceded by States to their citizens it was clearly drafted as a human right[24]. Although it is undebatable that this was clearly a new way to deal with information by States one cannot but wonder that the absence of words such as "State interest" and "national security" in the Convention can be considered as evidence of the narrowing considerably of peacetime censorship[25]. In fact the Convention does not refer to the words cited before, but uses "national safety"[26] to justify one of the limitations to freedom of information. This exception and wording are not alone sufficient to prove that peacetime censorship changed. Actually what happened is that the relation between States on the topic was excluded from the provisions of the Convention[27]. So the important point here to be made is that by shifting the attention from the relationship between States to the relation between a State and its citizens the document focused on the rights of the individual – or human rights, as stated before. This changed approach was utilized in the drafting[28] of article 19 of the International Covenant on Civil and Political Rights[29], but it was not totally accepted by communist countries[30]. Nevertheless the Covenant final text reported the wording proposed by the western

[23] UN Economic and Social Council resolution 152 (VII), 28 August 1948, doc. E/1050, p. 15, available at https://tind-customer-undl.s3.amazonaws.com/bad2a85a-6acc-4ec4-9de2-d03027f3195f?response-content-disposition=attachment%3B%20filename%2A%3DUTF-8%27%27E_RES_152%2528VII%2529-EN.pdf&response-content-type=application%2Fpdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Expires=86400&X-Amz-Credential=AKIAXL7W7Q3XFWDGQKBB%2F20220712%2Feu-west-1%2Fs3%2Faws4_request&X-Amz-SignedHeaders=host&X-Amz-Date=20220712T140325Z&X-Amz-Signature=abb5b23a9485386cdf678bb1c86ee329b38663e7b50bb4b7b7bb003753e8e903 and Carlos P. Romulo and John P. Humphrey, Final act of the United Nations Conference on Freedom of Information, held at Geneva, Switzerland, from 23 March to 21 April, 1948, E/CONF.6/79, 22 April 1948, available at https://tind-customer-undl.s3.amazonaws.com/c7514d33-b6c2-423d-a089-39a4ddea2d4b?response-content-disposition=attachment%3B%20filename%2A%3DUTF-8%27%27E_CONF-6_79-EN.pdf&response-content-type=application%2Fpdf&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Expires=86400&X-Amz-Credential=AKIAXL7W7Q3XFWDGQKBB%2F20220712%2Feu-west-1%2Fs3%2Faws4_request&X-Amz-SignedHeaders=host&X-Amz-Date=20220712T140820Z&X-Amz-Signature=30c9663906dc67dafd3f946198379780203f543e8135e849a1074ce3b4894d71.

[24] Art. 1 of the draft Convention on freedom of information (from now on the Information Convention), Carlos P. Romulo and John P. Humphrey, supra note 23, at p. 14-15.

[25] The last words of the sentence reflect the opinion of Elisabeth A. Downey, op. cit., at p. 346. To support her hypothesis the author further States in her work that the specification of "military security" is the narrower term used in the draft convention on freedom of information. This term is nowhere to be seen in the draft convention wording. It is used instead in Art. 4 of the draft convention on the gathering and international transmission of news, Carlos P. Romulo and John P. Humphrey, op. cit. at p. 8, and in Resolution no. 12 of Conference on freedom of information, Carlos P. Romulo and John P. Humphrey, op. cit., at p. 28.

[26] Art. 2 (a) of the Information Convention, Carlos P. Romulo and John P. Humphrey, op. cit., at p. 15.

[27] In this case one can agree with Elisabeth A. Downey that the draft Information Convention did not formulate "provisions in terms of neutrality, or mutual aid and protection, or even protection of the public order and promotion of mutual understanding", op. cit., p. 346.

[28] For a report on the discussion around the drafting of art. 19 of the International Covenant on Civil and Political Rights (from now ICCPR) see Social, Humanitarian, and Cultural Questions, International Organization, vol. 16, University of Wisconsin Press, 1962, pp. 119-120. The USSR proposed a specific amendment, that it withdraw afterwards, in which it proposed that the draft art. 19 of the draft ICCPR should include "the prevention of war propaganda, incitement to enmity among nations, racial discrimination, and the dissemination of *slanderous rumours*" (emphasis added), USSR amendment to article 19 of the draft Covenant on Civil and Political Rights (A/C.3/L.921), 11 October 1961, available at https://digitallibrary.un.org/record/826756/files/A_C-3_L-921-EN.pdf. This shows that aside from political division and world views some States (east block mainly) were still interested in the repercussions that disinformation ("enmity among nations" / "slanderous rumours") might have caused in the relation between States.

[29] ICCPR, United Nation Treaty Series (from now UNTS), vol. 999 (I-14668).

[30] Ibidem at p. 171.

countries and based on the draft convention on freedom of information[31]. On the other hand, the draft article on outlawing propaganda for war, proposed by the Soviet Union[32], was accepted by the other States[33] and positioned as article 20 in the final version of the ICCPR.

The new way in which States looked at propaganda changed the approach of scholars too. The main concern today is the respect of human rights and the relations between a State and its citizens leaving aside the relationship between States. The latter did not have much attention, until 2016.

3. General international law

This section gives an overview of the different opinion expressed by international law scholars to tackle the issue of disinformation. The following subsections present these positions according to the main principle of international law they support.

a. Sovereignty.

Right after the 2016 US presidential elections a variety of scholars started to dig into the phenomenon of disinformation and its relation international law. The majority fell satisfied in stopping right at the principle of sovereignty[34]. According to them disinformation operations conducted by Country A against Country B during the latter's election was affecting the *domain réservé* of the Country B. This principle involves also non-intervention and seems to be a fancy solution. On one hand such an analysis is appealing as it seems to be immediate sound and sensible. On the other, it either implicitly or explicitly requires the change of another cardinal element of non-intervention: coercion. Those who support this thesis believe that non-intervention applies to disinformation because the interference in a vital process of the affected State (e.g. elections) has in itself the element of coercion. Others, with whom the author agrees, have criticized[35] this, noting that the element of coercion requires the affected State to act in a way it would otherwise not[36]. Circling back to the US elections in that case there were influence operations conducted through social media campaigns, hacking of a private institution email (e.g the Democratic National Convention), etc. but there was not direct manipulation of votes, voting machines or the like. The

[31] ICCPR art. 19.

[32] ICCPR art. 20.

[33] According to Elisabeth A. Downey the US thought that the ICCPR draft art. 26 (that later became art. 20) undermined art. 19. In reality, the said article "supplemented paragraph 3 of Article 19, which allowed restrictions necessary for special limited purposes. Although the United States did not favor any provision allowing governmental interference in speech, the restriction against incitement to war and hatred could be viewed as safeguarding international welfare just as domestic law provisions sometimes permit free speech to be curtailed for the national welfare […] In this way, the article reaffirmed the position taken in Articles 1, 3 and 5 of the 1936 Convention Concerning the Use of Broadcasting in the Cause of Peace", Elisabeth A. Downey, op. cit., p. 348-349.

[34] According to Don Herzog "it's time, past time, to bury sovereignty". In his book Sovereignty RIP he argues that sovereignty is pernicious and because through history it has been limited, divided and made accountable then it has no more use and should be substituted with principles such as State, jurisdiction and authority. See Don Herzog, Sovereignty RIP, Yale University Press, 2020, p. 290-291. See also Samantha Besson, definition of sovereignty, Max Planck Encyclopedia of Public International Law (from now on MPEPIL), Max Planck Institute for Comparative Public Law and International Law (from now on Max Planck Institute), Prof. Rüdiger Wolfrum (director 2004–2020), April 2011, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1472?prd=EPIL.

[35] L. FERRO, *No Interference, No Problem: Voter Influence Operations and International Law, Revue belge de droit international*, 2020/1, para. 3.2. For a technical analysis of the US media that the debunks the efficiency of Russian influence in the 2016 US Presidential elections see Yochai Benkler, Robert Faris, and Hal Roberts, Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics, Oxford University Press, 2018.

[36] The principle was crystalized by the International Court of Justice (from now ICJ) "[i]ntervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones", Military and Paramilitary Activities in and Against Nicaragua, Nicaragua v. United States, 1986, Merits, Judgement, ICJ Rep., p. 14, para. 205 (from now Nicaragua case). See also Philip Kunig, definition of Prohibition of non-intervention, MPEPIL, Max Planck Institute, Prof. Rüdiger Wolfrum (director 2004–2020), April 2008.

latter are all necessary elements to characterize this as a rightfully and topical example of non-intervention which includes coercion.

The debate on coercion is expanding also outside the circle of disinformation aficionados becoming a central point also for the critics of intelligence operations[37]. For these scholars coercion needs reviewing and a fresh approach to it could be the answer to these type of acts conducted by States. If this approach is to work for intelligence operations conducted by a State against another then mutatis mutandis it should also be applicable to disinformation. This academic interpretation is surely interesting but nothing more than lex ferenda. Let us not believe that outside academic circles any State will support such a view with its practice[38]. Aside of any spur of the moment comment, we saw already that this did not happen for disinformation[39] or cyber operations[40].

With the covid-19 epidemic a so-called infodemic has erupted and State and non-State actors used the internet and social media to disinform the population about the disease and its cure. This topic caught the attention of the ubiquitous Michael Schmitt that, in a unique tandem with Marko Milanovic, observed that "the point at which influence becomes coercion *remains unsettled in international law*, but some acts of misinformation would unambiguously qualify as prohibited intervention. Even when they do not, it must be remembered that the misinformation might violate the target State's sovereignty on the basis of interfering with an inherently governmental act"[41]. The sentence is quite confusing. While proposing for covid-19 misinformation the same analysis used for election interference the authors seem to suggest a new interpretation of coercion or the absence of it in some cases of prohibited intervention. This because they reckon the limits that coercion poses to the non-intervention principle, but at the same time they state that misinformation might be prohibited intervention without coercion. An interesting position that is presented as fact and not supported by an explanation to the reader or at least by a clear example. Furthermore the authors are convinced that misinformation might violate the targeted State sovereignty by interfering with an inherently governmental act which is a tautology as the definition of non-intervention in itself refers to sovereignty[42] and would not exist in its actual formulation without this principle[43].

b. Due diligence

Another approach that is getting traction is due diligence. Various authors have shared their work and opinion on the topic in the latest book on the topic[44]. However it is Antonio Coco and

[37] I. NAVARRETE and R. BUCHAN, *Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions, Cornell International Law Journal, Vol. 51, No. 4*, 2019, p. 897-953, available at: https://scholarship.law.cornell.edu/cilj/vol51/iss4/4.

[38] The use of the future tense is needed as no State has shown to consider disinformation – or intelligence operations for that matter – a violation of the principle of non-intervention. For the time being any Statement given by a State that refers to non-intervention has to be seen as political affirmation and not a binding legal one.

[39] The US used retorsion by expelling Russian diplomats and imposing sanctions but it did not go further against Russia on the matter. One cannot exclude that the US did so willingly to avoid proving any State practice on the matter (for its own future good).

[40] See E. B. COSSIDENTE, *Much Ado About Nothing, Opinio Juris*, January 26, 2021, available at https://opiniojuris.org/2021/01/26/much-ado-about-nothing/.

[41] See supra at note 1, p. 270.

[42] See supra at note 34. The ICJ in the Nicaragua case also Stated that "A prohibited intervention must accordingly be one bearing on matters in which each State is permitted, *by the principle of State sovereignty*, to decide freely" (emphasis added), supra at note 36, para. 205.

[43] Some argue that the principle of sovereignty and the principle of non-intervention are two principles of international law that are different and not necessarily connected while the author is of the idea that the two are intertwined as the MPEPIL definition of non-intervention reports: «[w]ithout the prohibition of intervention, the principle of sovereignty could not be fully realized. Thereby, the of the non-intervention rule is the protection of the sovereignty of the State» (emphasis added). Philip Kunig, supra note 36 at para. 9. See also ICJ in the Nicaragua case supra at note 36, para. 205.

[44] Due Diligence in the International Legal Order, Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds.), Oxford University Press, 2020. For an in-depth analysis of due diligence in human rights law see Maria Monnheimer, Due Diligence Obligations in International Human Rights Law, Cambridge University Press, 2021.

Talita de Souza Dias who dig into the concept in relation to cyber and peripherally also into what they call content-based operations[45]. In referring to due diligence they acknowledge that there is a fervent debate on the topic but that it "misses the point by focusing too much on the meaning of 'due diligence' and its applicability […] [t]his has resulted in binary, 'all-or-nothing' views". What they suggest is a "shift from label to substance"[46] an approach that would eventually prove how "States continue to be bound by a patchwork of duties to prevent, stop and redress harm applying by default to cyber-space"[47]. Now these scholars' findings are that five common threads[48] involve due diligence in regard to actions conducted in cyber[49] but these are not helping in defining due diligence as a general principle of international law[50]. According to them "doubts about a general principle or a cyber-specific protective obligation should not be presented as an alternative to a legal vacuum"[51] as a comprehensive legal framework is in place and it is composed of two primary rules of international law: Corfu Channel and the no-harm principles. In addition, different obligations of due diligence arising under specialized branches of international law apply concurrently to cover different uses, aspects and consequences"[52] of cyber related activities.

The method undertaken by these authors is surely understandable and of a practical character and maybe it is needed to propose a solution in connection to a debated theme such due diligence is currently in international law[53]. As this is clearly appreciable and gives an immediate answer on what tools one can use in relation to a State obligation at the same time it does not end the discussion nor give a definite answer. One cannot but wonder if this pragmatic approach was the result of the willingness of academia to offer States some usable compendium instead of just theoretical answers.

[45] T. DIAS AND A. COCO, *Cyber due diligence in international law, Project Report, Oxford Institute for Ethics, Law and Armed Conflict*, March 2021, p. 92.

[46] A. COCO AND T. DE SOUZA DIAS, *'Cyber Due Diligence': A Patchwork of Protective Obligations in International Law, The European Journal of International Law, vol. 32 no. 3*, 2021, p. 774.

[47] Ibidem.

[48] The threads are explained as follows: "First, all protective obligations surveyed above presuppose the exercise of State sovereignty, jurisdiction or some level of control over a territory, the right-holder, the perpetrator or the events in question. Secondly, and relatedly, those obligations are subject to and limited by a State's capacity to act, which gives effect to the idea that States have common but differentiated responsibilities in international law. Thirdly, those flexible obligations of conduct are coupled with obligations of result to put in place the minimal legislative, judicial and executive infrastructure needed to exercise due diligence. Fourthly, a State is only required to act in the presence of some degree of information about the harm or risk in question, ranging from actual or constructive knowledge to objective foreseeability. Lastly, all these elements are geared towards a central duty to prevent, halt and/or redress harm or the risk thereof, consisting of an act contrary to the rights of other States, significant transboundary harm or a violation of more specific international rules, such as IHRL and IHL", supra note 46, at p. 804-805.

[49] A new dimension that includes, as Stated previously, content-based operations or disinformation.

[50] Supra note 46, at p. 805.

[51] Ibidem.

[52] Ibidem.

[53] The UK for example acknowledged that "UNGGE Norm 13(c) provides that States should not knowingly allow their territory to be used for internationally wrongful acts using information and communications technology […] the fact that States have referred to this as a *non-binding norm* indicates that there is not yet State practice sufficient to establish a specific customary international law rule of 'due diligence' applicable to activities in cyberspace" (emphasis added), UK Mission to the United Nations, 'United Nations Group of Governmental Experts on Advancing Responsible State Behaviour in Cyberspace in the Context of International Security: Application of International Law To States' Conduct In Cyberspace - United Kingdom Statement (from now on UK cyber Statement), 3 June 2020, p. 4-5, available at https://www.gov.uk/government/publications/application-of-international-law-to-States-conduct-in-cyberspace-uk-Statement.

c. Self-determination.

This leaves us to analyze the different avenue that only a couple of scholars took. Ohlin[54] and Tsagourias[55] believe that disinformation that influences an election process violates the principle of self-determination. In the words of former, the difference between the two scholars consists in the fact that the latter "links sovereignty and self-determination together"[56]. Ohlin goes further saying that putting together these two principles is of no use as "[s]elf-determination is already legally protected by international law, as a collective right, so one does not need the concept of sovereignty and the principle of nonintervention to demonstrate that election interference is illegal"[57]. Not everyone agrees on it, some observed that the principle refers to the decolonization movement and the rights of former colonies to be independent and refers to a collective right difficult to define[58].

The lowest common denominator of all the solutions presented to the question of the applicability of international law to misleading information is the principle of sovereignty. If we look at the position of States on the matter the majority accepts the premises Stated in the Tallinn Manual[59] that sovereignty applies onto cyberspace but there are some significant exceptions such as the UK that reckoned sovereignty as "fundamental to the international rules-based system", but it observed also that it is not a "rule as a matter of current international law"[60], a position that was held over time[61]. The UK is not alone, for Israel "there are diverging views regarding whether sovereignty is merely a principle, from which legal rules are derived, or a binding rule of

[54] For Ohlin "Russia's interference in the 2016 election violated the American people's collective right of self-determination, rather than violated the sovereignty of the United States or violated the principle of nonintervention", Jens David Ohlin, Election interference, Cambridge University Press, 2020, p.102.

[55] Tsagourias argues that «External interference not only inverses this process by undermining its integrity and freedom but also impinges on the expression of authority and will by the government that emerges. It thus transpires that by aligning the principles of non-intervention and self-determination, the normative and operational scope of non-intervention shifts to the people and to the process of forming authority and will», Nicholas Tsagourias, Electoral Cyber Interference, Self-Determination and the Principle of Non-Intervention in Cyberspace, EJIL: Talk!, August 26, 2019, available at https://www.ejiltalk.org/electoral-cyber-interference-self-determination-and-the-principle-of-non-intervention-in-cyberspace/; he later Stated that "[T]he right to self-determination is broader and is not only exclusively linked to the right of peoples to form their own State […] External interference through disinformation combined with identity falsification, for example, distorts, undermines or inverses the process and nullifies the genuine expression and authority and will by the people", Nicholas Tsagourias, Electoral Cyber Interference, Self-Determination and the Principle of Non-Intervention in Cyberspace, Dennis Broeders and Bibi van Den Berg (eds.), Governing cyberspace: behaviour, power and diplomacy, Rowman & Littlefield, 2020.

[56] Supra, note 54, at p. 103.

[57] Ibidem, at p. 104. Ohlin affirms that Tsagourias approach "comes at a cost, since it is inconsistent with the prevailing view of sovereignty", ibidem. A curious statement considering that his view of self-determination in turn differs from the prevailing opinion on the subject. He reckons it someway by saying that "international lawyers are not accustomed to thinking of self-determination so robustly", ibidem.

[58] Schmitt observed that self-determination «is facially plausible, but this interpretation of the right presents numerous challenges. It is a collective, not individual, right, which raises issues as to its enforcement; the right typically applies in the context of the emergence of a State; there are practical difficulties in determining that the interference actually blocked the will of the people; and it is unclear whether the concept of a "people" in international law, which is already unsettled, can refer to the entire population of an established State or only to a sub-group» (emphasis added), Michael N. SCHMITT, *Foreign Cyber Interference in Elections: An International Law Primer, Part II, EJIL: Talk!*, October 16, 2020, available at https://www.ejiltalk.org/foreign-cyber-interference-in-elections-an-international-law-primer-part-ii/.

[59] Rules 1-4 of the Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations (from now on the Tallinn Manual), Michael N. Schmitt (ed.), Cambridge University Press, 2017, p. 11-27.

[60] UK Attorney General Jeremy Wright speech "Cyber and International Law in the 21st Century" delivered at Chatham House, 23 May 2018 (from now on UK AG Cyber Speech) available at https://www.gov.uk/government/speeches/cyber-and-international-law-in-the-21st-century.

[61] «Sovereignty, as a general principle, is a fundamental concept in international law […] The United Kingdom does not consider that the general concept of sovereignty by itself provides a sufficient or clear basis for extrapolating a specific rule or additional prohibition for cyber conduct going beyond that of non-intervention», UK cyber Statement, supra note 53, at p. 4.

international law in itself"[62]. In expressing Israel position its deputy attorney general, Roy Schondorf, did not want to offer a definite position, but stressed some points. One of them is the need to distinguish "between sovereignty, which is typically used as a general concept that connotes independence, and "territorial sovereignty", which is an international legal rule"[63]. As Mr. Schondorf acknowledged "[a]nother matter closely related to the issue of sovereignty is that of non-intervention". It has to be underlined that the position of Israel is a classic one as it reiterates the coercion part of the obligation of non-intervention[64].

It is not the scope of this work to resolve the current issues pertaining to sovereignty[65], but one can surely observe that currently the debate shows a clear east/west separation in State practice. When it comes to information and communications technology (ICT[66]) China[67], Iran[68] and Russia[69] have a very rigid and historical approach to sovereignty more so when it comes to internet,

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[62] R. SCHONDORF, *Israel's perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations, EJIL: Talk!*, 9 December 2020 (from now on Israel's cyber perspective), available at Israel's perspective on Key Legal and Practical Issues Concerning the Application of International Law to Cyber Operations – EJIL: Talk! (ejiltalk.org).

[63] Ibidem.

[64] "We concur with the various positions expressed in this regard, such as that which was presented by former U.S. State Department Legal Adviser Brian J. Egan, and more recently reiterated by U.S. DOD General Counsel Paul C. Ney, Jr. that a «cyber operation by a State that interferes with another country's ability to hold an election or that manipulates another country's election results would be a clear violation of the rule of non-intervention»., Israel's cyber perspective, supra at note 62.

[65] See supra note 43.

[66] States often prefer to use the acronym ICT instead of cyber as the Tallinn Manual does when it affirms that cyber "[c]onnotes a relationship with information technology" (see supra note 59, at p. 564). Military definition concentrate on the space element of cyber. AAP-06 NATO glossary of terms and definitions, ed. 2021, cyber in itself is not defined whereas another all-comprising term is used, cyberspace defined as "[t]he global domain consisting of all interconnected communication, *information technology* and other electronic systems, networks and their data, including those which are separated or independent, which process, store or transmit data" (emphasis added) available at https://standard.di.mod.bg/pls/mstd/MSTD.blob_upload_download_routines.download_blob?p_id=281&p_table_name=d_ref_documents&p_file_name_column_name=file_name&p_mime_type_column_name=mime_type&p_blob_column_name=contents&p_app_id=600. If we look at national definitions of the term they are quite similar, for example the US DoD dictionary of military and associated terms defines it "[a] global domain within the information environment consisting of the interdependent networks of information technology infrastructures and resident data, including the Internet, telecommunications networks, computer systems, and embedded processors and controllers" (emphasis added), p. 55, available at https://www.jcs.mil/Portals/36/Documents/Doctrine/pubs/dictionary.pdf; for the UK "cyberspace is the interdependent network of information technology that includes the internet, telecommunications networks, computer systems and internet-connected devices. For the military, and when considering our efforts to counter threats in cyberspace, it is an operational domain, along with land, sea, air and space", UK National Cyber Strategy 2022, p. 18, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1053023/national-cyber-strategy-amend.pdf.

[67] «The principle of sovereignty applies in cyberspace. States should exercise jurisdiction over the ICT infrastructure, resources, data as well as ICT-related activities *within* their territories, and have the rights to protect their information systems and important data against damage resulting from threats, interference, attack and sabotage» (emphasis added), China's Positions on International Rules-making in Cyberspace, October 20th 2021, available at https://www.fmprc.gov.cn/mfa_eng/wjb_663304/zzjg_663340/jks_665232/kjlc_665236/qtwt_665250/202110/t20211020_9594981.html#:~:text=China%20believes%20that%20the%20following,ii.

[68] «According to the armed forces of the Islamic Republic of Iran, the territorial sovereignty and jurisdiction of the States are also extended to all elements of the cyberspace», article II para.2 of the Declaration of General Staff of the Armed Forces of the Islamic Republic of Iran Regarding International Law Applicable to the Cyberspace, Armed Forces Cyberspace Center, July 2020, available at https://nournews.ir/En/News/53144/General-Staff-of-Iranian-Armed-Forces-Warns-of-Tough-Reaction-to-Any-Cyber-Threat.

[69] Contrary to the other two States cited Russia does not refer directly to relationship between sovereignty and territory but in its contribution to the Official compendium of voluntary national contributions on the subject of how international law applies to the use of information and communications technologies by States submitted by participating governmental experts in the Group of Governmental Experts on Advancing Responsible State Behaviour in

social media, etc. For these States the physical element of ICT is a vital one. Therefore the law should protect and respect a State national prerogative on cyber, including data[70]. Western States agree to a certain extent on the importance of sovereignty to physical infrastructure[71] but do not have a clear stance on the objectification of data[72].

4. Is a different approach possible?

Another way to look at the issue of disinformation and its (ab)use by States is by considering another principle of international law that has not had much attention in relation to this topic: abuse of right.

Abuse of right has been defined as "a State exercising a right either in a way which impedes the enjoyment by other States of their own rights or for an end different from that for which the right was created, to the injury of another State"[73]. Although it is believed by many that abuse of right is part of international law, the doubt remains on whether it is a general principle of law or customary international law[74].

Historically the concept was first presented in the form of an example by a member of the

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Cyberspace in the Context of International Security established pursuant to General Assembly resolution, pag. 79-82, available at https://front.un-arm.org/wp-content/uploads/2021/08/A-76-136-EN.pdf, it refers back (at pag. 79) to para. 17 of the Resolution adopted by the General Assembly on 5 December 2018 (available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/418/04/PDF/N1841804.pdf?OpenElement) that States as follows "State sovereignty and international norms and principles that flow from sovereignty apply to State conduct of ICT-related activities and to their jurisdiction over ICT infrastructure *within their territory*" (emphasis added).

[70] For China data is something exploitable. According to this view its citizen data is not their own but belongs to the State. On China's social credit system see Vrinda Vinayak, The Human Rights Implications of China's Social Credit System", Oxford Human Rightsa Hub blog, September 2019, available at https://ohrh.law.ox.ac.uk/the-human-rights-implications-of-chinas-social-credit-system; Eunsun Cho, The Social Credit System: Not Just Another Chinese Idiosyncrasy, Journal of Public & International Affair (digital), Princeton University, May 1, 2020, available at https://jpia.princeton.edu/news/social-credit-system-not-just-another-chinese-idiosyncrasy; Simina Mistreanu, Fears about China's social-credit system are probably overblown, but it will still be chilling, March 8, 2019, Washington Post, available at https://www.washingtonpost.com/opinions/2019/03/08/fears-about-chinas-social-credit-system-are-probably-overblown-it-will-still-be-chilling/.

[71] Including Israel ("States undoubtedly have sovereign interests in protecting cyber infrastructure and data located in their territory", Israel's cyber perspective, supra note 62) and the UK ("the targeting of essential medical facilities, the downing of civilian aircraft, the sabotage of nuclear power stations, are no less unlawful and no less deserving of a robust and legitimate response when they are undertaken by cyber means than when they are done by any other means", UK AG Cyber Speech, supra note 60).

[72] According to the Tallinn Manual data is intangible and thus cannot be considered as an object (see supra note 59, p. 437, para. 6 of the commentary to Rule 100). On the topic of data as object see Michael N. Schmitt, The Notion of 'Objects' during Cyber Operations: A Riposte in Defence of Interpretive and Applicative Precision, Israel Law Review, 48(1), p. 81-109, 2015; Kubo Mačák, Military Objectives 2.0: The Case for Interpreting Computer Data as Objects under International Humanitarian Law, Israel Law Review, 48(1), p. 55-80, 2015; Heather Harrison Dinniss, The Nature of Objects: Targeting Networks and the Challenge of Defining Cyber Military Objectives, Israel Law Review, 48(1), p. 39-54, 2015; Michael N. Schmitt, Israel's Cautious Perspective on International Law in Cyberspace: Part II (jus ad bellum and jus in bello), EJIL: Talk!, 17 December 2020 available at https://www.ejiltal k.org/israels-cautious-perspective-on-international-law-in-cyberspace-part-ii-jus-ad-bellum-and-jus-in-bello/. The European Union (EU) General Data Protection Regulation (GDPR) of 2016 refers to data specifically connected to information that is personal, art. 4 (1), genetic, art. 4 (13), or biometric, art. 4 (14), EU regulation 2016/679 of 27 April 2016, available at https://eur-lex.europa.eu/eli/reg/2016/679/oj.

[73] Alexandre Kiss, definition of abuse of right, MPEPIL, Max Planck Institute, Prof. Rüdiger Wolfrum (director 2004–2020), December 2006, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1371. For Lauterpacht to be an abuse the exercise of the right should be "unreasonable, and pursued in an arbitrary manner, without due consideration of the legitimate expectations of the other State", Hersch Lauterpacht, Oppenheim's International Law, Longmans, 1955, at p. 345. See also Steven Reinhold, Good faith in international law, UCL Journal of Law and Jurisprudence, vol. 2, 2013, p. 49.

[74] M. BYERS, *Abuse of Rights: An Old Principle, A New Age, McGill Law Journal, vol. 47*, 2002, at p. 397.

Committee of Jurists that was preparing the draft statute of the Permanent Court of International Justice (PCIJ), during the discussion of general principles of law which would form the legal basis for the Court's decisions[75]. Accordingly the Statute enshrined that the Court in taking its decisions had to follow the "general principles of law recognized by civilized nations"[76] as it currently does the International Court of Justice (ICJ)[77]. So in determining a principle of international law both Courts analyzed (and still analyze) municipal laws[78]. Following this very same idea

> «[m]ost of the authors came to the conclusion that in civil law countries, whether European or not, as well as in socialist countries, the abuse of rights was […] prohibited. As far as common law countries are concerned, it was submitted that, although a decision in a given case may be based upon principles of the law of torts, when a court looks into the motives of an actor the legal theory applicable is indistinguishable from that of abuse of rights. This, it was held, supports the contention that the theory is accepted in the private law of common law countries[79]».

States have a high level of discretion in their action and in the application of their rights[80] and this makes it difficult to establish when a right was abused or applied extensively. At the same time States have argued in international courts that their counterpart had abused a right[81]. For Freya Baetens parties in international proceedings claim abuse of rights more for "factual and strategic decision-making than in rigorous legal reasoning"[82]. She believes that State do cite abuse of rights for coherence between position held in different fora and consistency between the Court proceeding phases[83]. The author is also of the opinion that reference to abuse is on the increase because of:

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[75] A. KISS, supra note 73, at para. 8.

[76] Art. 38 (3) of the Statute of the Permanent Court of International Justice (from now PCIJ) available at https://www.un-ilibrary.org/content/books/9789210559096s003-c002/read.

[77] Art. 38 (1) (c) of the Statute of the International Court of Justice (from now ICJ) available at https://www.icj-cij.org/en/statute.

[78] Reasons of space do not allow for an in-depth analysis of the different sources of international law and their relationship. The author acknowledges that international law principles might be created by other ways cited by art. 38 of the ICJ Statute and it also reckons the current discussion on jus cogens and external sources of international law that might arise outside the domestic laws of States and might apply to States even if they do not – in principle – agree with them. On the topic see a summary presented by Ori Pomson, General Principles of Law Formed Within the International Legal System?, EJIL: Talk!, July 12, 2022, available at https://www.ejiltalk.org/general-principles-of-law-formed-within-the-international-legal-system/.

[79] A. KISS, op. cit., para. 9. For the same reasons explained earlier (see supra note 78) this statement of Kiss will be taken as an accepted point in the description of abuse of right. For a more detailed analysis and discussion on civil law and common law approaches to abuse of right see Michael Byers, supra note 73, p. 391-397.

[80] Steven Reinhold, supra note 73, p. 50.

[81] Most notably UK in the Fisheries Jurisdiction Cases (United Kingdom v. Iceland), Memorial of the Merits of the Dispute Submitted by the Government of the United Kingdom, [1975] ICJ Pleadings, vol. 1, 1975 at p. 265; Liechtenstein in the Nottebohm Case (Liechtenstein v. Guatemala), Memorial Submitted by the Government of the Principality of Liechtenstein, ICJ Pleadings, vol. 1, 1955, p. 21; Norway in the Case of Certain Norwegian Loans (France v. Norway), ICJ Rep. 9, 1957, at p. 73, Liberia and Ethiopia in the South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) (Second Phase), ICJ Rep. 6, 1966, at p. 10 and p. 480-83; Belgium in the Case Concerning the Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase), ICJ Rep. vol. 1 p. 3, 1970, at p. 17; Australia in the Nuclear Tests Case (Australia v. France), ICJ Rep. 253, 1974, at 362; Nauru in the ICJ Pleadings, Certain Phosphate Lands in Nauru (Nauru v. Australia), vol. I, 1990, Chapter V, p. 163. See Marcelo Vázquez-Bermúdez, UN International Law Commission, Special Rapporteur on General Principles of Law, First report on general principles of law, A/CN.4/732, 5 April 2019, p. 46 available at https://digitallibrary.un.org/record/3805756?ln=en and Third report on general principles of law, A/CN.4/753, 18 April 2022, p. 39-40 (and accompanying notes) available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/N22/321/79/PDF/N2232179.pdf?OpenElement; Michael Byers, supra note 73, p. 397-398.

[82] F. BAETENS, *Abuse of Process and Abuse of Rights Before the ICJ: Ever More Popular, Ever Less Successful?, EJIL: Talk! post*, October 15, 2019, available at https://www.ejiltalk.org/abuse-of-process-and-abuse-of-rights-before-the-icj-ever-more-popular-ever-less-successful/. In the post the author also cites the latest cases where States brought claims of abuse of rights in international fora.

[83] Ibidem.

(1) possible rise in 'real' abuse[84];
(2) antagonism between the parties[85];
(3) the refusal by international courts to clearly say in which cases or circumstances such arguments will never be accepted[86];
(4) internal political reasons[87].

This position is at odds with the one of Judge Hersch Lauterpacht that noted that a State «may find that it has overstepped the imperceptible line between impropriety and illegality, between discretion and arbitrariness, between the exercise of the legal right to disregard the recommendation and the abuse of that right, and that it has exposed itself to consequences legitimately following as a legal sanction[88]». Even Judge Christopher G. Weeramantry in explaining that the «principle of sustainable development is […] part of modern international law[89]» observed that the «components of the principle come from *well-established* areas of international law[90]» such as abuse of rights.

International courts also referred to abuse of rights in their decisions. The PCIJ, for example, in the case concerning certain German interests in Polish Upper Silesia[91], held that it is the party who alleges that bad faith occurred has to prove its statement[92]. This position proves that for the Court abuse of rights does exists but cannot be presumed by an international court. In relation to the decisions of the ICJ Breyers opines that the Court «itself has never endorsed the principle unequivocally, neither it, nor any of its members, has ever rejected the place of abuse of rights in international law[93]».

Anyone who is confronted with abuse of right has to refer to what has been called "clearest jurisdictional formulation of the norm prohibiting abuse of rights"[94] the World Trade Organization (WTO) Shrimp Case[95] where the WTO Appellate Body in referring to the General Agreement on Tariffs and Trade[96] states that

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[84] Ibidem, with reference to the Immunities and Criminal Proceedings case (Equatorial Guinea v. France).

[85] Ibidem, with reference to the Certain Iranian Assets case (Islamic Republic of Iran v. United States of America) and the Jadhav case (India v. Pakistan).

[86] Ibidem.

[87] "[T]here seems to be a growing tendency towards 'fighting every step', if only to demonstrate to one's home constituency that no stone has been left unturned and thereby deflect public disapproval in case the ultimate judgment is not in one's favour – a desire that is understandable in the context of the ongoing public backlash against international courts and tribunals", ibidem.

[88] Judge Hersch Lauterpacht separate opinion on the Advisory opinion on the voting procedure on questions relating to reports and petitions concerning the Territory of South West Africa, ICJ Reports, 1955, p. 67, at p. 120. Lauterpacht was a proponent of abuse of rights as it will be explained later in the text.

[89] Judge Weeramantry separate opinion in the Gabčíkovo-Nagymaros project case (Hungary v. Slovakia), Judgment, ICJ Reports 1997, p. 7, at p. 95. In an earlier occasion he talked of abuse of rights as derived from the creative power of the principle of equity, Judge Weeramantry separate opinion in the Maritime delimitation in the area between Greenland and Jan Mayen case (Denmark v. Norway), ICJ Reports 1993, p. 38, at p. 217 and p. 245.

[90] Ibidem, emphasis added.

[91] Case concerning certain German interests in Polish Upper Silesia, Merits , PCIJ series A, n. 7, 1926. From now on referred to as Germany v. Poland.

[92] In the words of the Court "Germany undoubtedly retained until the actual transfer of sovereignty the right to dispose of her property, and only a misuse of this right could endow an act of alienation with the character of a breach of the Treaty; such misuse cannot be presumed, and it *rests with the party who states that there has been such misuse to prove his statement*" (emphasis added), Germany v. Poland, supra note 91, at p. 30. See also the PCIJ's position ibidem at p. 37-38.

[93] Michael Byers, op. cit., at p. 400. Unfortunately as said earlier this article does not allow for a more in depth analysis of other decisions of the PCIJ and ICJ.

[94] Alexandre Kiss, op. cit., para. 14. See also Michael Byers, op. cit., at p. 401.

[95] World Trade Organization (WTO), Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755.

[96] General Agreement on Tariffs and Trade (GATT), 1947, available at https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm. GATT 1994 additions available at

> «[t]he chapeau of Article XX is, in fact, but one expression of the principle of good faith. This principle, at once a general principle of law and a general principle of international law, controls the exercise of rights by states. One application of this general principle, the application widely known as the doctrine of *abus de droit*, prohibits the abusive exercise of a state's rights […]. An abusive exercise by a Member of its own treaty right thus results in a breach of the treaty rights of the other Members and, as well, a violation of the treaty obligation of the Member so acting[97]».

International agreement touch on abuse of rights. The two most notable examples are the Vienna convention on the law of treaties[98] and the United Nations convention on the law of the sea[99]. The latter explicitly refers to it in article 300 where it specifies that «States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right[100]».

In the analysis of abuse of rights one has also to refer to academia, not only for it importance as a source of international law[101], but also for the discussion that it had on the topic[102]. Hersch Lauterpacht who was a supporter of this principle not only gave one definition of it[103], but also acknowledged the limits that his broad definition of it entails for an international judge. Therefore he stated that "there is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint"[104]. As recalled earlier he referred to the principle even as an international judge[105]. Another advertiser of abuse of rights its Alexandre Kiss that both in its famous work L'abus de droit en droit international[106] and in his entry of the same principle in the Max Planck encyclopedia of international law[107] underlined the "evolutive role of the concept of prohibition of abuse of right"[108] and that art. 38 (1) (c) of the ICJ Statute "opens the door for such a possibility"[109]. An approach that is coherent with the one

https://www.wto.org/english/docs_e/legal_e/06-gatt.pdf#:~:text=The%20General%20Agreement%20on%20Tariffs%20and%20Trade%201994,and%20%28d%29%20the%20Marrakesh%20Protocol%20to%20GATT%201994.

[97] Supra note 95 at para 158 (italics in the original). Article XX chapeau states that "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures", supra note 96.

[98] Vienna Convention on the Law of Treaties (VCLT), UNTS, vol. 1155 (I-18232), p. 332. VCLT art. 26 (pacta sund servanda); art. 31 (treaty interpretation); art. 46 (competence in concluding a treaty) and art. 69 (consequences of the invalidity of a treaty) do all refer to good faith. On good faith and its relationship with abuse of rights see Markus Kotzur, definition of good faith (bona fide), MPEPIL, Max Planck Institute, Prof. Rüdiger Wolfrum (director 2004–2020), January 2009, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1412; Steven Reinhold, supra note 73, p. 49-53; Alexandre Kiss, supra note 73.

[99] United Nations convention on the law of the sea, UNTS, vol. 1833 (A-31363), p. 397.

[100] Ibidem.

[101] See previous discussion on the topic at beginning of this section and accompanying notes.

[102] With the exception of Marie Lemey, L'abus de droit en droit international public, Librairie générale de droit et de jurisprudence, Tome 135, 2021, lately the academic discussion and attention on abuse of rights has lessened increasingly and this work hopes to reignite it.

[103] See supra at note 73.

[104] H. LAUTERPACHT, The development of international law by the international court, Stevens & Sons, 1958, p. 164; Michael Byers, op. cit., at p. 407.

[105] Cfr supra note 88.

[106] A. KISS, *L'abus de droit en droit international*, Librairie générale de droit et de jurisprudence, Paris, 1953.

[107] Supra at note 73.

[108] Ibidem at para. 35.

[109] Ibidem.

expressed by Judge Weeramantry in his separate opinions[110]. Although he believed that abuse of rights was an application of good faith[111] Cheng affirmed that the

> «exact line dividing the right from the obligation, or, in other words, the line delimiting the rights of both parties is traced at a point where there is a reasonable balance between the conflicting interests involved. This becomes the limit between the right and the obligation, and constitutes, in effect, the limit between the respective rights of the parties. The protection of the law extends as far as this limit, which is the more often undefined save by the principle of good faith. Any violation of this limit constitutes an abuse of right and a breach of the obligation-an unlawful act[112]».

Given this statement one cannot but agree with Byers that in reality Cheng was a supporter of the principle. In fact for him "the principle of abuse of rights is not redundant. Instead it is, in one small but important respect, supplemental to the principle of good faith"[113].

Clearly not everyone in academia agreed on the importance of abuse of rights and on its definition. Schwarzenberger and Brown[114], for example, noted that "it is difficult to establish what is supposed to amount to an abuse, as distinct from a harsh but justified use, of a right under international law" by a State[115]. A reply to this might come from Lauterpacht observing that "[t]he power to apply some such principle as that embodied in the prohibition of abuse of rights must exist in the background in any system of administration of justice in which courts are not purely mechanical agencies"[116]. Byers[117] thinks that even if abuse of rights is considered a principle that is too loose and poorly defined it can still be applied by international courts according to the principle of non liquet[118] and thanks to judicial innovation[119].

On the other hand, Lowe opines that abuse of rights is an interstitial norm which do not exist on their own[120]. For him "interstitial or modifying norms are simply concepts [...] Tribunals employ interstitial norms not because those norms are obligatory as a matter of law, but because they are necessary in order that legal reasoning should proceed"[121]. In addition he stressed that

> «[t]he effect of interstitial norms is to set the tone of the approach of international law to contemporary problems, bringing subtlety and depth to the relatively crude, black-and-white quality of primary norms […] The concept of abus de droits [..] is likely to achieve much greater prominence as a check upon exercises of legal power by

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[110] See supra at note 89.

[111] B. CHENG, *General principles of law as applied by international courts and tribunals*, Stevens & Sons, 1953, p. 121.

[112] Ibidem at p. 131-132.

[113] M. BYERS, op. cit., at p. 411.

[114] They are not alone. Space does not allow for more insight on the critics of abuse of rights but also Jerome Elkind did not approve of the principle by believing that it was not applicable to common law and international law as these systems do not have codes. For a substantial reply to Elkind's critique see Michael Byers, op. cit., at p. 414-419.

[115] G. SCHWARZENBERGER and E. D. BROWN, *A Manual of International Law*, 6th edition, Milton: professional books, 1976, at p. 84. See also Michael Byers, op. cit., at p. 412.

[116] H. LAUTERPACHT, supra note 104, at p. 165 and M. BYERS, op. cit., at p. 413.

[117] M. BYERS, op. cit., at p. 413-414.

[118] "[N]on liquet means that the court cannot decide a case due to a gap (or lacuna) in the law. Although courts and legal scholars have traditionally rejected non liquet as prohibited by international law, the implicit finding of a non liquet by the International Court of Justice (ICJ) in its Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) has revived the debate about whether non liquet is permissible under international law and consistent with the judicial function", Daniel Bodansky, definition of non liquet, MPEPIL, Max Planck Institute, Prof. Rüdiger Wolfrum (director 2004–2020), May 2006, available at https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1669.

[119] On judicial innovation see also Alexandre Kiss, supra notes 108-109.

[120] V. LOWE, *The politics of law-making: are the method and character of norm creation changing?*, in Michael Byers (ed.), The role of law in international politics: essays in international relations and international law, Oxford University Press, 2000, at p. 216. See also Michael Byers, supra note 74, at p.422-423.

[121] Ibidem at p. 217.

States[122]»

Against the position of Lowe, Byers is of the idea that abuse of right has an important role to play. "beyond situations of normative conflict into situations where the problem is the *absence of a countervailing right* rather than the problem of mediating between different rights"[123]

5. Conclusions

The main problem with disinformation is that in itself is not enough to prove wrongdoing. Even if the invisible college of international lawyers begs to differ States have not yet taken a clear position on the issue[124]. The fact is that in the absence of solid and scientific evidence that links a cognitive behavior (disinformation) to a real life action one can only analyze that behavior in the context of a statewide approach to an issue[125]. At this stage a Country tries to reach its goals through a counter normative practice that means in bad faith by abusing an otherwise lawful principle or treaty. In this context by conducting disinformation campaigns[126] Nations do harm the international order in itself because they seek to unbalance other States and by doing so – in the context of a globalized world – their actions have repercussions for all the international community.

Due to the complexity of disinformation campaigns conducted by States it might prove difficult for the international lawyer to find a legal solution to the problem. This should not stop them. As Tammes once stated

> «[i]n certain legal situations there was no clearly defined interaction of rights and obligations and the rights remained undivided in law […] State responsibility did not then arise from the violation of a primary rule of international law, but was determined, in the absence of such a rule, by the parties themselves or by an impartial authority on the basis of general rules[127]».

He was such a believer in abuse of rights as a type of State responsibility that in disagreeing with Ago[128] he got right at heart of the problem: "abuse of rights could only be finally solved by rules of State responsibility and the question should not, therefore, be left aside indefinitely because it was considered too difficult". On this rules further work should be done.

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[122] Ibidem at p. 218.

[123] M. BYERS, supra note 74, at p.423, emphasis added.

[124] State practice has not changed the principles of international law (e.g. non-intervention, etc.). Cfr previous Section 2 and supra note 35.

[125] In this context disinformation is not a tool used in a coordinated manner by various agencies of a Government to achieve a common goal. Disinformation is then a piece of a bigger jigsaw. These type of joined activities are called whole-of-Government approach or joined-up-government.

[126] For example in the 2016 and 2020 US Presidential Elections, see Luca Ferro, supra note 35, at para. 2.3; Intelligence Community Assessment, Foreign Threats to the 2020 US Federal Elections, US National Intelligence Council, 10 March 2021, p. 2, available at https://www.dni.gov/files/ODNI/documents/assessments/ICA-declass-16MAR21.pdf. Another example is the UK referendum on its departure from the EU (also known with the acronym Brexit), see UK Intelligence and Security Committee of Parliament, Report on Russia, 21 July 2020, p. 12-14, available at https://isc.independent.gov.uk/wp-content/uploads/2021/03/CCS207_CCS0221966010-001_Russia-Report-v02-Web_Accessible.pdf; Donatienne Ruy, Did Russia Influence Brexit?, Center for Strategic & International Studies, blog post, 21 July 2020; Dan Sabbagh, Luke Harding, and Andrew Roth, Russia report reveals UK government failed to investigate Kremlin interference, 21 July 2020, The Guardian, available at https://www.theguardian.com/world/2020/jul/21/russia-report-reveals-uk-government-failed-to-address-kremlin-interference-scottish-referendum-brexit.

[127] Yearbook of the international law commission 1970, vol. 1, A/CN.4/Ser.A/1970, p. 185 (para. 40).

[128] At the time Roberto Ago was the International Law Commission Special Rapporteur on State responsibility and observed that abuse of rights "did not belong to the topic of State responsibility".

*International humanitarian law, gender, and detention in armed conflict**

Diritto internazionale umanitario, genere, e detenzione nei conflitti armati

Federica Favuzza

Summary: 1. Introduction. – 2. Relevant definitions and scope of the study. – 3. IHL treaty-based rules expressly recognising the specific needs and circumstances of female detainees. – 4. The argument in favour of a gender-sensitive interpretation and application of relevant IHL rules. – 4.1. Taking biological/physiological differences into account. – 4.2. Taking societal expectations of gender roles into account. – 5. Concluding remarks.

1. Introduction

It is nowadays widely acknowledged that women, men, girls and boys may be affected by armed conflict and conflict-related detention differently, based on their specific needs, capacities and perspectives[1]. This article aims to examine international humanitarian rules relevant to detention in armed conflict with a view to determining whether they take or may be interpreted as taking various gender issues into account[2].

After defining relevant terms and clarifying the rationale underlying the present investigation (para 2), the article will, first, identify the few IHL treaty-based rules that expressly recognise the specific needs and circumstances of female detainees (para 3) and, second, show how certain international humanitarian law (hereinafter, IHL) obligations may justify or even demand a gender-sensitive interpretation and application of other IHL rules concerning the treatment of detainees (para 4).

2. Relevant definitions and scope of the study

For present purposes, the term "detention" is meant to refer to any deprivation of personal liberty, i.e., 'the confinement of a person in a restricted space or location', which 'begins when a

* This article is based on a presentation titled "Gender issues related to detention in armed conflict" and delivered by the author on 12 May 2022 on the occasion of the 22nd Congress of the International Society for Military Law and the Law of War on "Exploring Opportunities for Improvement of International Peace and Security", Florence (Italy). The author would like to thank the Italian section of the ISMLLW, as well as Prof. Gabriella Venturini, the other speakers on the panel and participants in the Congress, for their interesting comments and questions. The usual disclaimer applies.

[1] See, inter alia, H. NIEBERGALL-LACKNER (with contributions by H. Durham), *Article 14: Respect for the persons and honour of prisoners*, in ICRC, *Commentary on the III Geneva Convention*, 2020, para 1682 (available at: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp); H. Hiemstra and V. Murphy, *GCIII Commentary: I'm a woman and a POW in a pandemic. What does the Third Geneva Convention mean for me?*, in *Humanitarian Law and Policy*, 8 December 2020 (available at: https://blogs.icrc.org/law-and-policy/2020/12/08/gciii-commentary-woman-pow-third-geneva-convention/); F. Ní Aoláin, *The gender of occupation*, in 45 *The Yale journal of international law* 2-2020, p. 336 ff.; A. Hoover Green, *"Mind the Gap:" Measuring and Understanding Gendered Conflict Experiences*, in F. Ní Aoláin, N. Cahn, D.F. Haynes and N. Valji (eds), *Oxford Handbook of Gender and Conflict*, Oxford University Press, 2018, p. 316 ff.; F. Ní Aoláin, *Gendering the law of occupation: The case of Cyprus*, in 27 *Minnesota Journal of International Law* 1-2018, p. 107 ff.; K. Lindvall, *Chapter 2. Approaching the Geneva Conventions with a gender perspective*, in C. Tengroth and K. Lindvall (eds), *IHL and gender – Swedish experiences*, Swedish Red Cross and Swedish Ministry for Foreign Affairs, 2015, p. 15 ff. (available at: www.redcross.se/ihlandgender).

[2] Clearly, the question of whether IHL rules take or should be interpreted as taking gender issues into account is not only relevant in relation to the rules on the treatment of detainees. However, given how these individuals are particularly vulnerable to certain IHL violations (see G. Venturini (Ed.), *Integrating Gender Perspectives into International Operations: A Training Handbook with Commentaries*, International Institute of Humanitarian Law, Sanremo, 2019, p. 92), the scope of this article is intentionally limited to detention.

person is apprehended/taken into detention and ends with their release'.[3] Thus, unless otherwise indicated, the term 'detainee' will be used as encompassing all persons deprived of their liberty in connection with an armed conflict. Still, it is worth recalling that several types of conflict-related detention may occur: in the context of an international armed conflict (hereinafter, IAC), individuals may be subjected to (*i*) internment[4], (*ii*) criminal detention[5], or (*iii*) retention[6]; in the context of a non-international armed conflict (hereinafter, NIAC), individuals are typically deprived of their liberty either by (*i*) internment or by (*ii*) criminal detention[7]. Once conflict-related detention begins, a number of IHL rules apply and regulate the detainee's treatment[8]. These are the rules that the present research work seeks to examine from a gender perspective.

As for the term "gender", whilst increasingly used in IHL legal commentary and analyses,[9] it is not included in any IHL treaty-based rule. Clearly, "gender" is no synonym of "sex": on the one hand, the latter refers to 'the biological … and physiological characteristics of a person, such as male or female'; on the other hand, the former is widely defined as 'the socially constructed roles, behaviours, activities, and attributes that a given society at a given time ascribes as appropriate for men and women'[10]. In other words, whereas 'sex is biologically determined', 'gender is socially constructed'[11].

In the present writer's view, the rationale for devoting the present investigation to *gender* issues and detention stems from two main considerations.

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[3] Ibidem, p. 89.

[4] Internment may be defined as a deprivation of personal liberty ordered by administrative authorities without any criminal charge being brought against the individual concerned. IHL regulates the internment of civilians posing a security threat (see Arts 41-42 of the IV Geneva Convention for aliens in the territory of a party to the conflict and Art. 78 of the same Convention for inhabitants of occupied territories) as well as of prisoners of war (hereinafter, POWs) (see esp. the III Geneva Convention).

[5] Criminal detention consists in the deprivation of personal liberty in connection with criminal proceedings. For relevant IHL rules, see esp. Arts 37 and 64 ff. of the IV Geneva Convention and Art. 75 of the I Additional Protocol, as well as several other rules within the III and IV Geneva Conventions related to penal and disciplinary sanctions of POW and civilian internees.

[6] Retention of medical and religious personnel is regulated at Arts 28 of the I Geneva Convention and 37 of the II Geneva Convention.

[7] Whilst IHL treaty rules applicable to NIACs are silent on the grounds and procedures for deprivation of liberty, certain rules do regulate the treatment of persons subjected to internment/detention. See, e.g., Article 3 common to the Geneva Conventions and Art. 5 of the II Additional Protocol.

[8] See esp. Art 12 ff. of the III Geneva Convention; Arts 76 and 79 ff. of the IV Geneva Convention; Art. 3 common to the Geneva Conventions; Arts 75-76 of the I Additional Protocol; Arts 5-6 of the II Additional Protocol. Clearly, different rules may apply depending on the type of conflict-related detention, with the vast majority of treaty rules concerning persons deprived of their liberty in the context of an IAC (in particular POW or civilian internees).
It should also be noted that several international human rights rules apply to the treatment of persons deprived of their liberty. However, the examination of these rules is outside of the scope of the present investigation. For a concise overview, see, inter alia, Venturini, see above at n 2, p. 93 ff.

[9] For recent contributions, see, *ex multis*, ICRC, *Gendered Impacts of Armed Conflict and Implications for the Application of International Humanitarian Law*, ICRC, Geneva, June 2022, p. 8; S. Bertotti, G. Heathcote, E. Jones and S. Labenski, *The law of war and peace: A gender analysis. Volume 1*, Zed Books, 2021; Ní Aoláin, *The gender of occupation*, see above at n 1; Venturini, see above at n 2, p. 15; A.-M. De Brouwer and L. Ruiz, *Gender and war: International and transitional justice perspectives*, Intersentia, 2019; G. Venturini, *Women, gender, and international humanitarian law: a complex relationship*, in F. Pocar (Ed.), *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives*, International Institute of Humanitarian Law, 40th Roundtable on Current Issues of International Humanitarian Law, Sanremo, 7-9 September 2017, FrancoAngeli, 2018, p. 215 ff. (available at: https://iihl.org).

[10] Venturini, see above at n 2, p. 15.

[11] ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, p. 8. For an extensive analysis of the use of the term "gender" in international law, see I. Rosenthal, V. Oosterveld and S. SáCouto, *What is 'Gender' in International Criminal Law*, in Id., *Gender and International Criminal Law*, Oxford University Press, 2022, p. 11 ff., p. 18. For the use of this term specifically in IHL, see, inter alia, Venturini, *Women, gender, and international humanitarian law*, see above at n 9, p. 215 ff.

First, there is an increasing awareness 'that not only an individual's biological functions, but [also] the gendered structures in society affect the[ir] status, needs and capacities'[12]. Based on these different needs and capacities, as well as perspectives, individuals may be affected by armed conflict and detention in different ways.[13] This is the main reason why the present investigation will be devoted to *gender* issues and conflict-related detention, rather than merely to *sex differences* and detention.

Second, by referring to *gender* issues and detention, rather than *women* and detention, men's specific needs, perspectives and experiences may also be taken into account when interpreting and applying relevant international rules. True, there are some IHL rules that specifically apply to *female* detainees and take *women*'s specific needs and circumstances into account. However, it is now widely recognised that '[b]oth men and women [may be] subjected to gendered violation of rules and standards established by' IHL.[14]

In the light of the above, the present investigation will deal not only with IHL rules specifically regulating the treatment of female detainees, but also with other IHL rules generally devoted to the treatment of detainees, with a view to demonstrating how the latter may be interpreted and applied as taking various gender issues into account.[15] In this perspective, the expression "gender issues" is meant to encompass both matters related to biological/physiological differences between the sexes and those linked to societal expectations of gender roles. Thus, the "gender-sensitive" interpretation and application of relevant rules for which this article aims to advocate is intended as broadly as possible to consider both types of matters.

3. IHL treaty-based rules expressly recognising the specific needs and circumstances of female detainees

As is well known, certain IHL treaty-based rules expressly recognise the specific needs and circumstances of female detainees[16]. Clearly, the existence of these provisions is not at odds with the principle of non-discrimination or equal treatment that is also established by several IHL rules applicable both to IACs and NIACs[17]. Indeed, not only do relevant provisions only prohibit 'adverse' distinctions[18], but they also include a clause clarifying that the prohibition of discrimination is

[12] Lindvall, see above at n 1, p. 16.

[13] See above at n 1. An illustrative case that has recently been examined by the ICRC is that of the rules on targeting, in particular the application of the principle of distinction. Indeed, '[t]he identification of who is a combatant and who is a civilian by parties to a conflict can be influenced by gender assumption', so that, 'when there is a margin of doubt in targeting decisions, women are more likely to be assessed to be civilians and men are more likely to be assessed to be combatants'. ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, p. 13.

[14] Venturini, see above at n 2, p. 3. A well-known example of a gendered violation of IHL affecting men as well as women is that of sexual violence. Clearly, sexual violence can affect both women and men. What it important to note is that, when it comes to men in armed conflict, it may be a 'gendered' violation of IHL rules if it is used as 'a deliberate strategy' to 'humiliate and emasculate' men, to force them to take the stereotypically submissive/subordinated position of women. H. Durham and O'Byrne, *Gender Perspectives on International Humanitarian Law*, in 92 *International Review of the Red Cross* 2010, p. 31 ff., p. 48.

[15] For a similar approach, see esp. ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, esp. p. 25 ff.; Hiemstra and Murphy, see above at n 1; Durham and O'Byrne, ibidem, esp. p. 38 ff.

[16] For a comprehensive examination of IHL rules specifically dealing with women, see, inter alia, N. Quenivet, *Special Rules on Women*, in A. Clapham, P. Gaeta and M. Sassoli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, 2015, p. 1271 ff.

[17] See ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, 2022, p. 25; Hiemstra and Murphy, see above at n 1; Venturini, see above at n 2, p. 95; Quenivet, ibidem, p. 1273.

[18] See Art. 12 of both the I and II Geneva Convention; Arts 14 para 2 and 16 of the III Geneva Convention; Art. 27 of the IV Geneva Convention; Art. 75 of the I Additional Protocol; Art. 3 common to the Geneva Conventions; Art. 4 of the II Additional Protocol. It should be noted that, although Art. 27 of the IV Geneva Convention does not expressly mention "gender" or "sex" amongst the grounds of prohibited discrimination, it is widely acknowledged that the list of said grounds is non-exhaustive. See, among others, ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, 2022, p. 25.

'[w]ithout prejudice to the provisions relating to [the concerned individual's] state of health, age and *sex*'[19]. Thus, while providing for an obligation of equal treatment, IHL also admits that certain exceptions be made.

Some of these exceptions are warranted by biological/physiological differences between sexes. Consider, in particular, the case of pregnant or nursing female detainees: Art. 89 para 5 of the IV Geneva Convention expressly requires that 'expectant and nursing [civilian internees] … be given additional food, in proportion to their physiological needs'; Art. 91 para 2 of the same Convention states that 'maternity cases … must be admitted to any institution where adequate treatment can be given and shall receive care not inferior to that provided for the general population'[20].

Interestingly, another set of IHL rules also take women's specific needs and circumstances into account. However, they do so not because of some biological/physiological difference, but because of a perceived gender-related vulnerability. This set of rules includes, for instance, those considering the gender-specific risks that female detainees are expected to face in respect of their dignity, privacy, and bodily integrity (e.g., rules requiring separate accommodation in detention camps and supervision by other women)[21].

Overall, IHL treaty-based rules recognising gender-specific needs and circumstances are sparse. This is probably unsurprising, considering that these treaties are forty-five or more years old. However, as the following paragraphs will show, the present writer agrees with those arguing that a gender-sensitive interpretation and application of relevant IHL rules is not only justified but also, in some cases, required by other IHL rules[22].

4. The argument in favour of a gender-sensitive interpretation and application of relevant IHL rules

For present purposes, alongside the abovementioned obligation of non-discrimination or equal treatment[23], three other IHL obligations may be of particular relevance: first, the obligation of humane treatment, that is established by several treaty provisions[24] and, according to the ICRC Study on customary IHL, also by a customary rule applicable to both IACs and NIACs[25]; second, the obligation to treat women with respect or with all the regard due to their sex, that is also provided

As for customary international law, see Rule 88 (Non-Discrimination) in J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law*, 3 Vol., Cambridge University Press, 2005 (hereinafter, ICRC Customary IHL Study).

[19] Emphasis added. It should be noted that Art. 16 of the III Geneva Convention is slightly different from other relevant provisions: 'Taking into consideration the provisions of the present Convention relating to rank and sex, and subject to any privileged treatment which may be accorded to them by reason of their state of health, age or professional qualifications'.

[20] A couple of other provisions within IHL treaties also refer to pregnant detainees. However, since they are not related to the treatment of detainees, they are outside of the scope of the present investigation. These provisions are: Art. 110 of the III Geneva Convention read in conjunction with Annex I - Model agreement concerning direct repatriation and accommodation in neutral countries of wounded and sick prisoners of war ('All women POW who are pregnant or mothers with infants and small children are eligible for accommodation in a neutral country'); Art. 76 para 2 of the I Additional Protocol ('Pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict shall have their cases considered with the utmost priority'); Art. 127 of the IV Geneva Convention ('Sick, wounded or infirm internees and maternity cases shall not be transferred if the journey would be seriously detrimental to them, unless their safety imperatively so demands').

[21] See Arts 25 para 4, 29 para 2, 97 para 4 and 108 para 2 of the III Geneva Convention; Arts 76 para 4, 82 paras 3-4, 85 para 4 and 124 para 4 of the IV Geneva Convention; Arts 75 para 5 and 77 para 4 of the I Additional Protocol; Art. 5 para 2 lit. *a*) of the II Additional Protocol; Rules 119 and 120 of the ICRC Customary IHL Study, see above at n 18.

[22] See ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, p. 25; Hiemstra and Murphy, see above at n 1.

[23] See above at Section 3.

[24] See Art. 27 of the IV Geneva Convention; Arts 13-14 of the III Geneva Convention; Art. 75 of the I Additional Protocol.

[25] See Rule 87 of the ICRC Customary IHL Study, see above at n 18.

by some treaty provisions[26] and, according to the ICRC Study, reflected in a customary rule obliging parties to respect the specific protection, health and assistance needs of women affected by armed conflict[27]; third, the obligation to respect one's honour, that is also established by several IHL rules.[28]

In the present writer's view, these obligations may not only justify but also demand a gender-sensitive interpretation and application of IHL rules related to the treatment of detainees. Indeed, the entire text of a treaty is part of the 'context' to be considered when interpreting the terms of one of its provision pursuant to Art. 31 of the Vienna Convention on the Law of Treaties.[29] It may thus be the case that 'other provisions of the same treaty […] have as a necessary consequence or implication a certain reading of the disputed term'[30]. Following this reasoning, it is contended that, by way of a contextual or systematic interpretation of relevant provisions on the treatment of detainees in the light of the abovementioned IHL obligations of humane treatment, of treating women with respect or with all the regard due to their sex, and of respecting one's honour, detaining authorities have a duty to make certain non-adverse distinctions with a view to taking various gender-issues into account[31]. While some of these issues are linked to biological/physiological differences (para 4.1), others are linked to societal expectations of gender roles (para 4.2).

4.1. Taking biological/physiological differences into account

When it comes to biological/physiological differences between sexes which may justify or even demand a gender-sensitive interpretation and application of IHL rules, the illustrative case of pregnant and nursing detainees comes to mind.

As mentioned above, there are a couple of treaty provisions specifically dealing with the treatment of pregnant/nursing civilian internees. Yet, no similar provision exists in respect of other categories of persons held in conflict-related detention – i.e., POWs, individuals held in criminal detention in the context of an IAC, and those deprived of their liberty for reasons related to a NIAC[32]. There is no specific rule, for instance, on these women's needs in relation to food or medical care. However, as previously mentioned, it may be argued that the gender-sensitive application of existing provisions is required by their contextual or systematic interpretation in the light of two of the abovementioned obligations, i.e., that of humane treatment and that to treat women with respect or with all the regard due to their sex.

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[26] See Art. 12 of the I and II Geneva Conventions; Art. 14 of the III Geneva Convention; Art. 76 of the I Additional Protocol.

[27] See Rule 134 of the ICRC Customary IHL Study, see above at n 18.

[28] See Art. 14 of the III Geneva Convention; Art. 27 of the IV Geneva Convention; Art. 75 para 1 of the I Additional Protocol; Art. 4 para 1 of the II Additional Protocol.

[29] Indeed, under Art. 31 of this Convention, '[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in light of its object and purpose' (emphasis added). On the notion of "context", see, inter alia, O. Dörr, *Article 31. General rule of interpretation*, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the Law of Treaties. A Commentary*, Springer, 2018, p. 559 ff., p. 582; M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Martinus Nijhoff Publishers, 2009, p. 415 ff., p. 427. For a similar reasoning in respect of the principle of non-discrimination under Art. 27 of the IV Geneva Convention and IHL rules on belligerent occupation, see: ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, p. 25-6.

[30] Dörr, ibidem, p. 583. The author cites the following judgments of the International Court of Justice: *Dispute Regarding Navigational and Related Rights* (2009) ICJ Report 213, paras 77-79 and 84; *Mutual Assistance in Criminal Matters* (2008) ICJ Report 177, para 123.

[31] The ICRC defines 'non-adverse distinctions' as those 'that are justified by the substantively different situations and needs of protected persons'. ICRC, *Gendered Impacts of Armed Conflict*, see above at n 9, p. 25. Indeed, it has been argued that allowing non-adverse distinctions would be in line with a principle of substantive (rather than merely formal) equality between men and women. See ibidem; Hiemstra and Murphy, see above at n 1; Quenivet, see above at n 16, p. 1273.

[32] See above at Section 3.

As far as food is concerned, existing provisions do refer to the link between food and health. Art. 26 of the III Geneva Convention states, inter alia, that '[t]he basic daily food rations [for POWs] shall be sufficient in quantity, quality and variety to keep [them] in good health and to prevent loss of weight or the development of nutritional deficiencies'. Similarly, Art. 76 of the IV Geneva Convention requires that '[p]rotected persons accused of offences […] enjoy conditions of food […] which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country'. As far as NIACs are concerned, Art. 5 para 1 lit. *b*) establishes that 'persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained', 'shall, to the same extent as the local civilian population, be provided with food and drinking water and be afforded safeguards as regards health and hygiene […]'. Whilst none of these provisions make express reference to pregnant or nursing women and their specific needs, it is contended that the requirement that food rations be sufficient to keep detainees in good health entails an obligation to ensure, among others, that 'pregnant or lactating women […] [are] provided with rations that [can indeed] keep them in good health'[33].

As for medical care, relevant treaties are also utterly silent when it comes to the specific needs of pregnant or nursing POWs or civilians held in criminal detention, as they are in respect of pregnant or nursing women who are deprived of their liberty for reasons related to a NIAC. This lack of explicit regulation is all the more striking, considering that reduced access to medical care during pregnancy may be fatal or result in stillbirth[34].

In this respect too, the present writer agrees with those scholars and experts arguing that an obligation to provide specific medical care stems from the abovementioned general obligations. Indeed, at least as far as POWs are concerned, this is the approach of the updated Commentary on the III Geneva Convention. In discussing the obligation under Art. 14 to treat women POWs with all the regard due to their sex, the authors expressly note how this general obligation 'affects the implementation of th[os]e provisions […] of the […] Convention relating to the medical care of POW', by requiring that 'medical services available to female prisoners of war [be] adequately equipped to address [their] gynaecological and *reproductive* health issues'[35]. This interpretation of relevant provisions is reiterated in the Commentary on Art. 30 of the same Convention[36], based on the provision's wording that '[e]very camp shall have an adequate infirmary where POW may have the attention *they require*'.[37] Interestingly, Peru's 2010 IHL and Human Rights Manual appears to share this view: after reiterating the principle of equal treatment and the obligation to treat women with all the regard due to their sex, the manual stresses that '[t]his means that due attention must be given', among others, 'to [POWs'] special requirements relating to biological factors, such as menstruation and pregnancy'[38].

It may be argued that similar conclusions should be drawn in respect of other types of detainees. Consider both civilians held in criminal detention in the context of an IAC and persons

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[33] B. Oswald, *Art. 26: Food*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, para 2113. See also Hiemstra and Murphy, see above at n 1.

[34] Hiemstra and Murphy, see above at n 1. On POWs' medical care obligations, see H. Durham and V. Murphy, *Equal treatment for women in State armed forces: Three practical implications for medical care*, in *Humanitarian Law & Policy*, 8 March 2019 (available at: https://blogs.icrc.org/law-and-policy/2019/03/08/equal-treatment-women-state-armed-forces-three-practical-implications-medical-care/).

[35] See Niebergall-Lackner, see above at n 1, para 1685 (emphasis added).

[36] See A. Breitegger, *Article 30: Medical attention*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, para 2230.

[37] Emphasis added. A similar wording is used at Rule 118 of the ICRC Customary IHL Study, see above at n 18, which is applicable to both IACs and NIACs and states that '[p]ersons deprived of their liberty must be provided with *adequate* food, water, clothing, shelter and *medical attention*' (emphasis added).

[38] See practice related to Rule 134 (Women) of the ICRC Customary IHL Study, ibidem See also Canada's 2004 Manual on POW Handling and Detainees, which states that 'pregnant female [POW] are … to be provided with appropriate dietary supplements as directed by the Canadian or coalition Medical officer'. Ibidem.

deprived of their liberty for reasons related to a NIAC. As far as the former are concerned, although Art. 76 of the IV Geneva Convention merely states that '[p]rotected persons accused of offences […] shall receive the medical attention required by their state of health', a contextual or systematic interpretation of this provision in the light of the abovementioned general obligations of humane treatment and of treating women with all the regard due to their sex would entail a duty to consider the specific medical care needs of women, including pregnant and nursing ones. The same reasoning applies to the latter: while Art. 5 para 1 lit. *c*)-*d*) of the II Additional Protocol simply provides that 'they shall have the benefit of medical examinations' and that 'their physical or mental health and integrity shall not be endangered by any unjustified act or omission', the obligation to treat them humanely and to treat women with respect would require that female detainees' specific health needs and circumstances be duly cared for.

Alongside food and medical care, hygiene is another illustrative case of how relevant IHL rules may be interpreted and applied as taking biological/physiological differences between sexes into account. The only relevant treaty provisions expressly referring to women are those requiring separate conveniences for female detainees; however, these rules seem to reflect the drafters' concern for women's privacy and (probably) bodily integrity. Not a single provision among those dealing with the hygiene of detainees appears to take the specific biological/physiological needs of women into account: most of them generally demand 'sufficient' conditions of hygiene (including water, soap and time to shower), yet make no express reference to the necessity of any non-adverse distinction between the sexes[39]. Still, in this respect too, it seems reasonable to argue in favour of a gender-sensitive interpretation and application of relevant provisions in the light of the obligations of humane treatment and of treating women with respect or with all the regard due to their sex. In this perspective, detaining authorities wishing to meet IHL requirements in respect of detainees' hygiene would have to provide female detainees with, e.g., sanitary pads/towels, and sufficient water and time to shower (even longer and more frequently than male detainees in case of menstruation)[40]. Interestingly, not only is this the view endorsed by the authors of the updated Commentary on the III Geneva Convention[41], but it also appears to be shared to a certain extent by the 2008 US Manual on Detainee Operations[42] and by the abovementioned Peru's 2010 IHL and Human Rights Manual[43].

[39] As far as POWs' hygiene is concerned, Art. 29 of the III Geneva Convention merely states that '[t]he Detaining Power shall be bound to take all sanitary measures necessary to ensure the cleanliness and healthfulness of camps […]' and that POWs 'shall be provided with sufficient water and soap for their personal toilet and for washing their personal laundry; the necessary installations, facilities and time shall be granted them for that purpose'. See, similarly, Art. 85 of the IV Geneva Convention concerning civilian internees. As for civilians accused of offences in the context of an IAC, Art. 76 of the IV Geneva Convention merely requires that they 'enjoy conditions of […] hygiene which will be sufficient to keep them in good health, and which will be at least equal to those obtaining in prisons in the occupied country'. Finally, in the context of a NIAC, the only relevant provision is Art. 5 para 1 lit. *b*), which states that 'persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained', shall 'be afforded safeguards as regards […] hygiene'.

[40] See Venturini, see above at n 2, p. 97.

[41] A. Breitegger, *Art. 29: Hygiene*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, paras 2223-4.

[42] The manual expressly requires that, '[i]n facilities where women detainees are accommodated, feminine hygiene supplies … be provided'. See practice related to Rule 118 (Provision of Basic Necessities to Persons Deprived of Their Liberty) of the ICRC Customary IHL Study, see above at n 18.

[43] See above at n 38.

4.2. Taking societal expectations of gender roles into account

As mentioned above, it is the present writer's view that a gender-sensitive interpretation and application of IHL rules on the treatment of detainees is justified or even, in some cases, required not only by biological/physiological differences, but also by societal expectations of gender roles[44].

Consider, for instance, IHL rules related to detainees' clothing. As far as civilian internees are concerned, Art. 90 para 2 of the IV Geneva Convention states that '[t]he clothing supplied by the Detaining Power […] shall not be ignominious or expose them to ridicule'. Arguably, respect for this rule demands, inter alia, a careful consideration of gender roles, i.e., of what is deemed to be the *appropriate* clothing for both female and male detainees at a given time and in a given society. When it comes to other types of detainees in either IACs or NIACs, no similar obligation is expressly established: Art. 27 of the III Geneva Convention merely takes quantity and climate-related needs into account when regulating the detaining power's obligations in relation to POWs' clothing; Art. 5 para 1 lit. *b*) of the II Additional Protocol does not even expressly mention clothing and simply establishes that 'persons deprived of their liberty for reasons related to the [NIAC], whether they are interned or detained', 'shall be afforded […] protection against the rigours of the climate'. Still, it is contended that, in the light of the abovementioned obligations of humane treatment and of respect for one's honour, all detainees are entitled to be supplied with clothing that do not expose them to ridicule on the basis of expected gender roles. This appears to be the view of the authors of the updated Commentary on the III Geneva Convention: after recalling that 'Articles 13 and 14(1) require, respectively, that [POWs] be treated humanely and that their persons and their honour be respected', they hold that, '[b]y implication, […] the clothing must respect the individual's person and honour and be adapted to, for example, their age, *gender* and religious and cultural background'.[45] In the present writer's view, the same reasoning applies to other categories of (female and male) detainees.

Another illustrative case of IHL rules that, while not expressly taking gender issues into account, may be interpreted in a gender-sensitive way is that of searches. Whereas the IV Geneva Convention expressly requires that a female civilian internee be only searched by another woman,[46] no similar obligation is established in respect of other categories of persons held in conflict-related detention. Also, no provision specifically refers to similar requirements for searches on men, although it is reasonable to assume that, in some societies, gender-related expectations on men's roles, behaviours, and attributes would make being searched by a woman particularly humiliating.[47] In the present writer's view, the general IHL obligations mentioned above, especially the one to respect each detainee's honour, would also apply to searches. This would entail the prohibition of any humiliation, including those based on societal convictions of gender roles. As far as POWs are concerned, this view appears to be shared by the authors of the updated Commentary on the III Geneva Convention[48]. It also seems to be endorsed, at least to a certain extent, by the abovementioned 2004 Canada's Manual on POW Handling and Detainees, which requires that POWs be 'searched … as far as possible by members of the same sex' and, '[w]hen this is not

[44] See above at Section 4.

[45] See B. Oswald, *Article 27: Clothing*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, para 2151 (emphasis added).

[46] See Art. 97.

[47] Durham and O'Byrne, see above at n 14, p. 40.

[48] They rely on the obligation of humane treatment under Art. 13 to argue that any search must 'be conducted by a person of the same gender, whenever possible, to mitigate the risk of humiliating the POW being searched'. See E. La Haye and H. Niebergall-Lackner (with contributions by A. Leshchinskaya), *Article 13: Humane treatment of prisoners*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, para 1667.

possible', that an officer be present.[49] Arguably, in this respect too, similar conclusions could be drawn in relation to other categories of persons held for reasons related to a conflict.

5. Concluding remarks

While it is undeniable that only a relatively small number of treaty provisions expressly consider gender-specific needs and circumstances of detainees (and do so by focussing exclusively on women), the present article has attempted to make a case for a gender-sensitive application of other IHL rules concerning the treatment of detainees. The research has shown that this is not only justified but also, in some cases, required by the contextual or systematic interpretation of relevant provisions in the light of the general obligations of humane treatment, of treating women with respect or with all the regard due to their sex, and of respect for one's honour[50].

It is certainly worth noting how the relevance of these findings is not limited to the duties of detaining authorities, as they may also significantly affect those of transferring ones[51]. Indeed, under both the III and IV Geneva Conventions, detainees can only be transferred to another State if this State is also a party to the Conventions and provided that it is willing and able to respect them; if this State 'fails to carry out the provisions of the Convention[s] *in any important respect*, the [State] by whom the [detainees] were transferred shall […] take effective measures to correct the situation or request the return of the detainees'[52]. In the light of the above conclusions on IHL, gender, and detention, the question arises of whether the phrase 'in any important respect' should be intended as encompassing also gender issues arising in relation to the treatment of detainees. Interestingly, the authors of the updated Commentary on Art. 12 of the III Geneva Convention contend that '[o]ne benchmark for determining whether a breach is 'important' is whether it violates the general obligation of humane treatment as articulated in Article 13'; thus, according to them, this phrase would also cover, e.g., 'a failure [of] the receiving Power […] to provide for the basic needs of the [POWs], specifically as relates to quarters, food, water and medical care in a way that would endanger their health'[53]. In this perspective, at least insofar as IACs are concerned,[54] it may be argued that IHL obligations related to the transfer of detainees would include the duty of any transferring State to ensure that the receiving authorities comply, inter alia, with certain gender-related requirements under IHL.

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[49] See Practice related to Rule 134 (Women) of the ICRC Customary IHL Study, see above at n 18.

[50] This would also be in line with relevant international human rights rules as they have been interpreted by treaty-bodies, as well as soft law instruments on the treatment of detainees. For a concise overview thereof, see Venturini, see above at n 2, p. 93 ff.

[51] A detailed examination of IHL rules regulating the transfer of detainees is outside of the scope of the present article. On recent case law, see, inter alia, T.O. Hansen and F. Nelson, *Liability of an Assisting Army for Detainee Abuse by Local Forces: The Danish High Court Judgment in Green Desert*, in *EJIL:Talk!*, 24 January 2019 (available at: www.ejiltalk.org/liability-of-an-assisting-army-for-detainee-abuse-by-local-forces-the-danish-high-court-judgment-in-green-desert/); T. Rodenhäuser, *Better Safe Than Sorry: Transferring Detainees Safely to Coalition Partners*, in *Lawfare*, 18 January 2019 (available at: https://www.lawfareblog.com/better-safe-sorry-transferring-detainees-safely-coalition-partners); Id., *Detainee transfers under IHL of IAC and under IHL of NIAC*, in G. Battisti (Ed.), *Deprivation of Liberty and Armed Conflicts: Exploring Realities and Remedies*, International Institute of Humanitarian Law, 41st Round Table on current issues of international humanitarian law, Sanremo, 6-8 September 2018, FrancoAngeli, 2019, p. 180 ff. (available at: https://iihl.org).

[52] Arts 12 of the III Geneva Convention and 45 of the IV Geneva Convention (emphasis added).

[53] See E. NOHLE and H. HIEMSTRA, *Article 12: Responsibility for the treatment of prisoners and conditions for their transfer to another Power*, in ICRC, *Commentary on the III Geneva Convention*, see above at n 1, para 1553.

[54] When it comes to NIACs, considering the lack of any IHL treaty provision specifically regulating the transfer of detainees, the answer to this question is not as straightforward and may heavily depend on applicable international human rights rules. For a detailed examination of the matter, see, inter alia, Rodenhäuser, see above at n 51, p. 183 ff.

Espionage, Grand Spymasters operating from their home Country and the exercise of extraterritorial criminal jurisdiction: politically motivated restraint and rule of law[*]

Lo spionaggio, i gran capi delle organizzazioni spionistiche che operano dal proprio Stato e l'esercizio della giurisdizione penale: moderazione determinata da ragioni politiche e regole dello Stato di diritto

Jean Paul Pierini

Summary: 1. Premise. – 2. Wartime espionage "naiveties", peacetime espionage uncertainties and some development not the be overlooked. – 3. Cyber espionage, commercial espionage and the convenience to frame political/military espionage as commercial. – 4. The scarce practice of prosecuting foreign spymasters. – 5. The prosecution of foreign spymasters and legal constraints. – 6. Towards a conclusion.

1. Premise

This presentation moves from the emerging practice of indicting foreign officials for cyber-espionage and hacking from across the borders. By contrast traditional old-fashioned "trench coat espionage"[1] hard work involving the inducement of officials to betray – often in exchange of bribes - violating obligations and fidelity owed to their Country, continue to have a relatively smaller "judicial footprint". While there are no limits to the prosecution of traitors, "official spies" are mainly arrested, released, expelled and (apparently) never sought again and those in upper positions in the intelligence chain of command unnamed and free to plan for a happy retirement. The question raised by the emerging practice in respect of "cyber espionage" is the political and judicial landscape has changed, new rules have emerged or simply if something went missed in the past. The purpose of the presentation is, accordingly, to explore the limits - if any - of the exercise of extraterritorial jurisdiction in respect of high-ranking officials of foreign agencies sitting in their office beyond borders, often thousands miles away, because of their ordering, directing, authorising or aiding espionage taking place "on the field" … which means in the target Country.

The reference to the "limits" in the title is mainly to "legal limits" having either substantive character under "criminal law", immunities foreign officials are afforded with, procedural devices codifying how and when prosecutorial discretion may be exercised to avoid political embarrassment to the government and also pure prosecutorial discretion exercised "case by case". Factual limits include policies not to engage in prosecutorial wars and eventually so-called "unspoken agreements".

Clearly, as pointed out in legal literature, the exercise of extraterritorial jurisdiction may pose a risk for foreign relations due to "over-criminalization", overzealous prosecution and overreaching legislation supplanting certain non-penal foreign policies abroad[2].

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[*] This presentation was given at the 22nd Congress of the International Society for Military Law and the Law of War, Florence, Italy 10 to 14 May 2022 "*Exploring Opportunities for Improvement of International Peace and Security*". The presentation was provided under the principle of non-attribution to the Italian MoD., the Italian Navy and the General Legal Affairs Office.

[1] The definition is borrowed from, D. CARVAJAL, *The Spy Who Fell Onto the Remainder Table; End of the Cold War Has Been Tough on Masters of the Espionage Novel*, New York Times, December 22, 1998, https://www.nytimes.com/1998/12/22/books/spy-who-fell-onto-remainder-table-end-cold-war-has-been-tough-masters-espionage.html

[2] S.A. KOH, *The Criminalization of Foreign Relations*, in *Fordham Law Review*, Vol. n. 90, 2021, p. 738.

The choice is ultimately a matter of policy, escalatory or non-escalatory approaches and priorities.

At this purpose, it has been observed that the focus of criminalization is ultimately on ordinary people, not on the person being punished and prosecution may be inherently alienating, especially from a transnational perspective[3]. This would mean that foreign nation's citizenry would identify with a fellow national prosecuted extraterritorially[4]. This may affect deterrence, which is in the end the main factor triggering extraterritorial prosecutions. That deterrence is indeed the driving factor of extraterritorial jurisdiction in respect of cyber espionage is demonstrated from the declared aim since the inception of the first prosecution in 2014 and from the actual debate on the loss of deterrence of Chinese cyber hacking.

The *interim* conclusions of this presentation is that the prosecution of foreign spymaster planning, authorising operations aimed at spying, recruiting and infiltrating agents and gaining access to classified materials will probably remain scarce while those involved in similar conditions in cyber-spying will be increasingly targeted with prosecutions.

2. Wartime espionage "naiveties", peacetime espionage uncertainties and some development not the be overlooked

The espionage legitimacy under International law (IL) debate is a topic in itself, influenced by "*Hegelian* impulse, the perpetual drive to find unity in disorder"[5]. While the impulse should be absolutely resisted - along with other "*Hegelian* impulses" that I will mention in subsequent parts of this presentation, the terms of the debate require to be briefly evoked; at least as recent developments in international case law require probably a closer look at.

The espionage legitimacy debate always moves from the discipline of wartime espionage; which by the way surfaces in most … peacetime "non-cyber" cases involving foreign military personnel.

While wartime espionage is governed by "naive rules" covering barely recognition on the field by military personnel detached from their units, operating behind enemy lines, peacetime espionage remains, according to view expressed by a scholarship linked to the operational side of the intelligence rather that to the academia, mostly unaddressed under international law.

Wartime espionage is subject to some archaic rules dealing with military personnel caught while not wearing their uniform. The rules of espionage in times of war, "*whether based on the Hague Regulations of 1907, the Geneva Conventions, the Protocol Additional to the Geneva Conventions, or other sources, are straightforward … But a spy, someone who does not wear a-military uniform or a clear military designation, is not entitled to protection as a prisoner of war*"[6]. Once the spy returns to his military organisation after his mission and is subsequently captured in battle wearing a soldier's uniform or designation, he cannot be punished for his prior act of spying and has a strong incentive to succeed in his spying mission and to return quickly to his military organisation[7].

Article 31 of the Hague Regulations reads: "*A spy who, after re-joining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage*".

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[3] So, J. KLEINFELD, *Reconstructivism: The Place of Criminal Law in Ethical Life*, in *Harvard Law Review*, Vol. n. 129 (2016), p. 1495.

[4] J. KLEINFELD, *Reconstructivism: The Place of Criminal Law in Ethical Life*, cit., p. 1495.

[5] J. RADSAN, *The Unresolved Equation of Espionage and International Law, in Michigan Journal of International Law*, vol. 28 (2007), p. 596.

[6] J. RADSAN, *The Unresolved Equation of Espionage and International Law*, cit., p. 602.

[7] *Ibidem*.

Under article 46(1) of Additional Protocol I to the 1949 Geneva Conventions, notwithstanding any other provision of the Conventions or of the Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

The picture of what wartime espionage rules address is that of a member of regular armed forces operating behind enemy lines dressed like an agricultural worker, hand-sketching a map of troops marching along a street at drumroll tempo. The purpose of the above provisions is essentially the protection of combatants[8] and what we could label as an enhanced form of old-times *Recognisance*.

If the "spy" commits a perfidy while in civilian clothes, prosecute even after re-joining its armed forces. The answer is obviously positive. Perhaps "ruses of war" in the form of so-called "war bribes" would not either be "healed" under the opponent's criminal law. At least not under the above espionage provisions. The question of punishment will be rather adjudicated based upon the understanding of "ruses of war".

Against the above background of wartime espionage, peacetime espionage and its relationship with IL is intensively debated and, as pointed out, legal literature may be divided into groupings respectively supporting the view that espionage is not illegal, that it is illegal and that it "*neither legal nor illegal*"[9].

The assertion of the legality under IL of espionage links - the exercise of the "*second oldest profession of the world*" to preventive self-defence or - from a chronological viewpoint to the gathering of intelligence prior, during and after a conflict. The fact that IL does nor entail an express prohibition is also a frequent assertion in the debate. The latter argument is reminiscent of the ancient "*Lotus rationale*" - to say what remains from a decision overruled by international maritime conventions - in a line of advisory opinions of the International Court of Justice, culminating with the *Kosovo* advisory opinion. Nevertheless, the arguments date back almost a century prior to the *Lotus* decision of the IPCJ.

The assertion of the illegality of peacetime espionage is based on the eventually clandestine nature of the presence of agents on the territory of another State and - but the question is debated - if they are acting under the pretence of an otherwise legitimate diplomatic coverage, from *charges d'affaires* to *military attaches*.

While we were *prima facie* sceptical about a construct leaving espionage outside the reach of IL, going through the predicates for and against the legitimacy of espionage could eventually reinforce the suggestive force of the said construct. At least because of the intriguing challenge represented by the need to define the relevance of the absence of effectiveness of the invoked rules and the impossibility for States to comply with any prohibition on espionage.

A recent comprehensive essay on the "liberty to spy" by *Lubin*[10] examines as "emerging voices", those taking the view that while peacetime espionage does not *per se* violate international law, the methods by which it is carried out might do so. These voices, according to *Lubin*, include the International Group of Experts who drafted the *Tallinn Manual 2.0* and introduced the example of the Agent of State A, covertly entering the territory of State B and while present there, by means of a USB drive introducing spyware in the Country's infrastructure[11].

The question of the legitimacy or illegitimacy under international law (IL) of "cyber espionage" is according to *Lubin* dominated by an obsession with territoriality, the violation of territorial integrity of the targeted State as juxtaposed to spying as a distance. The *focus* on territoriality in cyber literature triggered recriminations by less developed States claiming that

[8] *BVerfGE* 92, 277, decision of May 15, 1995.

[9] J. RADSAN, *The Unresolved Equation of Espionage and International Law*, cit., p. 602.

[10] A. LUBIN, *The Liberty to Spy*, in *Harvard International Law Journal*, Vol. 61 (2020), n. 1, p. 185, 188.

[11] The reference in the text is to Rule 4 - *Violation of sovereignty*, n. 6, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, edited by M.N. SCHMITT, Cambridge University Press, 2017, p. 18.

States lacking the technological capability to conduct cyber espionage were more likely to violate IL. It is not the aim of this presentation discussing if and when a "cyber-intrusion" violates IL. Should the position on cyber espionage and intrusion be taken at its face value, then the emphasis on the divide between cyber-operations with and without "physically presence" on another State's territory is … at the expenses of old-fashioned "trench coat espionage" hard work and most activities carried out in the territory of "State B". Curiously, the practice under domestic criminal law seems more focused on cyber-intrusions – though without claiming violations of international law – than on the criminal law consequences of violations of territorial sovereignty.

In the end *Lubin* defines its "limits to legitimate spying"[12]. He characterises the most significant decision in the subject matter, as a case of "illegitimate spying", because aimed at exploiting post-colonial Relations. The reference is to the International Court of Justice (ICJ) case of the *interim* measures sought by the *Democratic Republic of Timor East against the Commonwealth of Australia*. Without any intention to resolve the issue and at risk of fuelling further *Hegelian impulses*, the decision may not be overlooked and The applicant State sought *interim relief* after the seizure of documents in the office/residence of the Legal Adviser to and a Legal Representative of the Government of East Timor. The relief sought extended upon the issue of intelligence surveillance of advisers and Lawyers. The seizure was carried out by the Security Intelligence Organisation/Service (ASIO/ASIS), acting under warrants issued by the Attorney-General of Australia and the data pertained *inter alia* to the pending Arbitration under the Timor Sea Treaty between Timor-East and Australia. In the case, the Timor argued that as the seizure had "*been effected purportedly for reasons of Australia's national security, it is not credible that communications with the legal adviser from whose premises the documents were seized are not under continuing surveillance by Australian Government agencies".* Accordingly, it would be *"impossible for Timor-Leste to conduct confidential communications with its legal advisers, either in relation to the Arbitration or in relation to other matters*".

The *interim* measures sought by Timor East included "*that Australia* [were to] *give an assurance that it will not intercept or cause or request the interception of communications between Timor Leste and its legal advisers, whether within our outside Australia or Timor-Leste*". In the oral proceedings, Australia contended that "*if there is a principle in international law whereby any State is entitled to the confidentiality of all communications with its legal advisers, that principle (akin to legal professional privilege) is not absolute and does not apply when the communication in question concerns the commission of a crime or fraud, constitutes a threat to national security or to the higher public interests of a State, or undermines the proper administration of justice*". Further Australia insisted on the territorial character of the measures adopted within its jurisdiction.

The ICJ in its order of March 3, 2014[13] observed, "*that this claimed right might be derived from the principle of the sovereign equality of States, which is one of the fundamental principles of the international legal order and is reflected in Article 2, paragraph 1, of the Charter of the United Nations*". Further, according to the Court "*equality of the parties must be preserved when they are involved, pursuant to Article 2, paragraph 3, of the Charter, in the process of settling an international dispute by peaceful means*". In the Court's decision on the *interim* measures if a "*State is engaged in the peaceful settlement of a dispute with another State through arbitration or negotiations, it would expect to undertake these arbitration proceedings or negotiations without interference by the other party in the preparation and conduct of its case*". Such State "*has a plausible right to the protection of its communications with counsel relating to an arbitration or to negotiations, in particular, to the protection of the correspondence between them, as well as to the protection of*

[12] A. LUBIN, *The Liberty to Spy*, cit., p. 237.

[13] *Questions Relating to the Seizure and Detention of Certain Documents and Data* (Timor-Leste v. Australia) Request for the Indication of Provisional Measures, Order of 3 March 2014.

confidentiality of any documents and data prepared by counsel to advise that State in such a context".

In the end the Court found it appropriate "*to require Australia not to interfere in any way in communications between Timor-Leste and its legal advisers, either in connection with the pending arbitral proceedings and with any future bilateral negotiations concerning maritime delimitation, or in connection with any other related procedure between the two States, including the present case before the Court*". The corresponding *interim* measure was voted with a 15:1 majority.

The issue of intelligence surveillance continued to be discussed even after the decision on *interim measures* in the memorial subsequently submitted by Timor East and counter-memorial of Australia. Timor East specifically relied on the *Libananco Holdings Co. Limited v. Republic of Turkey*, investment case under the Energy Charter Treaty (ECT) in which the Tribunal ordered *inter alia* to the Respondent State to take steps to have mail intercepted in a criminal investigation and related to the subject matter of the then pending investment arbitration procedure destroyed[14]. Timor East didn't confine its arguments to client-lawyer privilege and broadened the scope of argued a "prohibition of interferences" under international, and recalled the UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States adopted by the UNGA on 24 October 1970[15]. Australia in its June 2014 Counter memorial, followed a narrow approach arguing that its surveillance was an expression of its territorial jurisdiction and trying to shape the invoked "right to confidentiality" to a mere client-lawyer privilege issue. The case was subsequently discontinued in 2015.

Prior to the decision on the *interim measures* the case raised some interest as to the fact if the court was going to rule on the legitimacy or not of espionage under international law. In a recent essay the decision is commented with the remark that "*some Judges looked favorably at NCND*", meaning "Neither Confirm Nor Deny"[16] , though the reference is to one dissenting opinion.

The surveillance aspects of the case were rooted in the arbitration process within the IPCA and have a follow up in an ongoing criminal prosecution in Australia in respect of the whistle-blower known as "witness K" in Australia. In the arbitration proceeding, Australia sought in January 2014 to disallow the giving of Potential evidence by "Witness K" who, according to Timor East, was to testify about Australian surveillance measures. The evidence was provisionally admitted in April 2014 and the disposition of Australia's application was deferred until the final award. Subsequently the parties pursued negotiations and finally terminated the arbitration in 2017. As to the criminal prosecution in October 2021, the Court of Appeal decided that the appeals trial of the former ASIO officer "Witness K" and the lawyer representing the Timorese government, the arbitration and former Attorney General, should not be dealt with in secret in order not to undermine confidence in the administration of justice. The trial was over their having revealed, in breach of Section 39 of the *Intelligence Servic*e Act 2001, details of a bugging operation in the Timor-East government cabinet rooms. Apparently, "Witness K" brought an employment claim to the Inspector General of Intelligence and Security in 2008, disclosing in his complaint details of the above operation. The inspector authorised "Witness K" to consult with his lawyer, who happened to be the long-time representative of Timor East. The Lawyer determined the operation to constitute the offence of conspiracy to defraud, contrary to section 334 of the Criminal Code 2002 (ACT). Offences eligible apply to matters with consequences "beyond the territorial limits of Australia".

The legitimacy of intelligence surveillance measures surfaced also *in the Matter of an Arbitration under the Arbitration Agreement between the Government of the Republic of Croatia*

[14] *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, https://www.italaw.com/sites/default/files/case-documents/ita0465.pdf.

[15] http://www.un-documents.net/a25r2625.htm.

[16] I. NAVARRETE - R. BUCHAN, *Out of the Legal Wilderness: Peacetime Espionage, International Law and the Existence of Customary Exceptions*, in *Cornell International Law Journal*, Vol. n. 51 (2019), n. 4, p. https://scholarship.law.cornell.edu/cilj/vol51/iss4/4.

and the Republic of Slovenia, and specifically in the Partial Award of 30 June 2016. The arbitration concerned a territorial and maritime dispute between Croatia and Slovenia. In about June 2015, Serbian and Croatian newspapers reported that telephone conversations between the arbitrator originally appointed by Slovenia in the present proceedings, and one of the Agents designated by Slovenia, had been intercepted. The transcript of the conversations, only partially disputed among the parties, pertained to the Arbitral Tribunal's deliberations. Croatia in turn notified Slovenia that it "considers that the Republic of Slovenia has engaged in one or more material breaches of the Arbitration Agreement", entitling Croatia to terminate the Arbitration Agreement "in accordance with Article 60, paragraph 1 of the Vienna Convention on the Law of Treaties" and that "*from the date of* [the] *note the Republic of Croatia ceases to apply the Arbitration Agreement*". The partial award was given on Slovenia's request that the Arbitration Agreement remained in force between the Parties and should continue until the Tribunal issues a final Award. Croatia made no request and sustained the legally fascinating position that the termination of the agreement was beyond the Tribunal's jurisdiction and to be settled under the (until now unexperienced) procedures of the VCLT. Perhaps due to the irresistible attraction of the assertion of *Kompetenz-Kompetenz* by any Arbitral Tribunal the partial awards was in Slovenia's favour. Slovenia while, engaged in showing that the arbitration was not definitively tainted, expressed nonetheless the view that: "*the source of the information reported . . . consists of illegal recordings … that presumably took place in Slovenian territory in violation of international and domestic legal provisions*"[17]. The Tribunal held that as Slovenia "*recogni*[sed] *that the source* [was] *unknown*" and "*has not contended that the recording is attributable to Croatia or that Croatia has also breached obligations under the Arbitration Agreement*". According to the Tribunal *"in the absence of any evidence clearly establishing such a breach, the Tribunal is not in a position to take this point into account"*[18]. The finding appears subtle and willing to turn a question about an alleged violation of international law into a question of an unsupported violation of the arbitration agreement. The decision marks a departure from the broader approach taken by the ICJ and shows unwilling to address the question of the illegitimacy of espionage under international law.

Although neither the ICJ decision on interim measures nor the Arbitral Tribunal partial award solve the matter, they would deserve a closer scrutiny.

3. Cyber espionage, commercial espionage and the convenience to frame political/military espionage as commercial

The exercise of extraterritorial criminal jurisdiction is often the result of a policy to "deter" "signalling" the intention not to tolerate a certain conduct. Recent practice shows the indictment agents, but also whole "structures" or units of intelligence agencies sometimes included as "not-named defendants" in redacted indictments.

A potential rationale, limited to cases of cyber-espionage, is represented by the choice to address the attribution question through judicial process. Judicial narratives may look intrinsically "more independent" in respect of findings of an agency attributing a cyber-attack to a certain Country. Nevertheless, in the case of U.S. indictment for cyber activities it should not be overlooked that an indictment - when returned by a grand jury - express only a "probable cause" as the standard for the true bill. Further grand jury proceedings follow an inquisitorial rule and the grand jury hears witnesses may hear evidence. Minutes of grand jury deliberations may be accessed only exceptionally. It may nonetheless be guessed that grand juries in cyber-espionage related proceedings rely mostly on evidence submitted by the prosecution and specifically on statements by the special agents in charge of the investigation and documents submitted thereof without

[17] Republic of Slovenia, Written Submission, para. 11 (Introduction)
[18] Partial Award, § 211.

questioning too much on how GRU and FSB structures and their personnel were tracked, identifies and mapped. This closes the distance between indictments and attribution of cyber activity by a report from an agency or administration.

Deterrence against commercial cyber espionage conducted by State actors and intelligence agencies dates back in U.S. practice to 2014. The prohibition of commercial espionage is the subject of an agreement by the United States and China reached by President Obama and Chinese President Xi Jinping.

Commercial espionage is beyond the object of this presentation. While several cyber-espionage cases are related to commercial espionage, others are not. The reference is to the DNC servers hacking case or the Iranian "accademica espionage" case.

Reading into the indictments, indistinctly referring to the "commercial side" of espionage, the impression one gets is that, behind the surface of the charge sheets and the framing of charges, the real target of the activity was instead "not-commercial" and political or military and that the framing of charges reflect the "versatility" of commercial espionage criminal provisions.

In the indictment of defendants *Dokuchaev*, *Sushchin*, *Belan* and *Baratov*[19] under their multiple "a.k.a.", in the "Gmail and Yahoo hacking case", the former two were officials of the FSB. The indictment included n. 47 counts for various computer related offences and commercial espionage offences. The charges included economic espionage, theft of trade secrets, computer fraud and abuse, fraud by wire, unauthorised access to protected computers, trafficking in unauthorised access devices and obviously "conspiracy" to commit such crimes. The criminal scheme saw the FSB defendants together with others named or unnamed "directed" the other defendants, one of the a most wanted hacker to gain unauthorised access to the computers of companies providing webmail and internet-related services located in the Northern District of California - *Yahoo* and *Google*'s "Gmail" service - and elsewhere, to maintain unauthorised access to those computers, and to steal information from those computers, including information regarding, and communications of, the providers' users.

The targeted accounts were those of Russian individuals but also those of U.S. government officials, employees of U.S. webmail and internet-related service providers. The "trade secrets" at issue were essentially the concerned mail services' UDB (Unified database), AMT (active management technology) and cookie minting technology and their value was almost purely instrumental, not for running a mail service, but for accessing the sought information from the targeted mail accounts.

Although not the main target of the "Technology Theft Campaign" conducted by the so called APT10 group (Advanced Persistent Threat - 10) working with the Chinese Ministry of State Security's Tianjin State Security Bureau, was "commercial", the indictment shows that the conduct involved, beside data from tech-Companies and the NASA, encompassed the theft of personal data of military personnel; latter reference is to more than 40 compromised computers belonging to the United States Department of the Navy and the theft of "personally identifiable information" of more than 100,000 U.S. Navy personnel[20].

Proprietary Business information of a Corporation, Equifax, a consumer reporting agency holding personal and sensitive information to "hundreds of millions of individuals" in the U.S. - was also the (apparent) target of the Chinese "Equifax hacking". The investigations led to the indictment of four PLA officials[21]. From the Equifax speaking indictment we do not learn how many among the "hundreds of millions of individuals'' were "sensitive targets" or "persons of interest" to China.

[19] United States District Court for the Northern District of California, *United States, v. Dokuchaev, et al.*, filed on February, 28, 2017, case n. CR 17 103.

[20] United States District Court for the Southern District of New York, *United States, v. Zhu Hua et al.*, filed on December 17, 2018, case n. 18 Crim 891.

[21] United States District Court for the Northern District of Georgia, *United States v. Wu Zhiyong et al.*, filed on January 28, 2020, case n. CR 17 103.

Also the investigations on the activity "Fancy Bear hacking team"[22] require a brief notation. The target of commercial espionage was represented by the U.S. Company Westinghouse and its servers within the Western District of Pennsylvania. The "narrative part" of the indictment shows that personal data and health data of individuals related to anti-doping organisations including, besides USADA (seated in Colorado Springs - United States), WADA, CCES, IAAF, FIFA), Arbitration bodies (TAS/CAS), laboratories (Spiez - Switzerland) and so on, were also the target of the group composed of Russian GRU officials belonging to two units. This is the reason why the case is also known as the "Russian anti-doping hacking case". Hacking was conducted mainly on-line but also in close proximity with targets through home or corporate or hotel *WiFi* networks. Such data were sought in order to be disclosed publicly because of hacking to smear and threaten the said individuals. The hacking operations also targeted the OPCW and subjects involved in the investigation of the "*Skripal poisoning*". The indictment was commented on legal blogs as to what its speaking part tells us about targets, approaches and tactics. Nevertheless, the statutory allegations tell us what is on the other side of the coin. They refer to criminal acts in violation of the laws of the Commonwealth of Pennsylvania (namely the tort law of invasion of privacy), conspiracy to defraud the United States (18 U.S.C. section 371), computer fraud. Although the grand jury recalls "all allegations" (§§ 1 to 94) - accordingly to include the "foreign" part of the hacks - conspiracy charges refer to the Western district of Pennsylvania and to the crime of fraud by wire (18 U.S.C. section 1343) and specifically to targets Westinghouse, USADA and the Canadian CCES. The specific registration through a U.S. Company of the fake domain resembling WADA and the payment made with bitcoins mined by servers used by the GRU official to finance their activity, supported the rooting in the United States money laundering charges (the payment was processed by a U.S. based company). At this purpose, it is worth mentioning that U.S. money laundering offences do not refer solely to "proceeds" of a "predicate offence". They also punish "laundering of monetary instruments" (18 U.S.C. §1956) and transport, transmission, or transfer of monetary funds from or through the United States … with the intent of "carrying on of specific unlawful activities". The story the charges in the indictment tell us is that of brilliant prosecutorial hard work adapting patterns developed a decade earlier the punishment of passive corruption of foreign public officials (lacking a specific offence) through money laundering provisions.

The convenience from a prosecutorial (an policy) point of view related to framing charges in respect of cyber espionage as commercial espionage or theft of trade secrets can be found in the avoidance of the need to disclose the content of accessed mail accounts, embarrassment due to the said content and disclosing damage assessment in political/military matters in respect of the cyber assessment.

4. The scarce practice of prosecuting foreign spymasters

As mentioned in the premise, while the prosecution of foreign officials for cyber-espionage commercial in essence or … as a matter of convenience, has become a hipe, prosecutions of ordinary trench coat espionage remain scarce.

From a purely criminal law viewpoint, a political/military espionage scheme involves on the traitor's side, ordinarily a civil or military public servant approached and enlisted (or entrapped), following layers of conduct:

a) Entering into an agreement with a foreign agent and at a certain point conspiring to provide some kind of information. Conduct eventually punishable autonomously as intelligence with a foreign power;
b) The act of procuring himself classified information or information characterised by some degree of secrecy;

[22] United States District Court Western District of Pennsylvania, United States v. Morenets et al.

c) Some ancillary offence related in violation of specific duties or regulations (e.g. prohibition to take photos or to carry a camera, accessing a classified network);
d) Handing over information to the foreign agent;
e) Obtaining money or other utilities or the promise of money or utilities form the foreign agent;

Some of the above layers could entail the criminal responsibility of the foreign agent approaching the servant. Layers a), b) and d) may be encompassed by criminal provisions on treason. Under layer a), the foreign agent may be liable for conspiracy and eventually under patterns developed in the relevant criminal system for joint criminal enterprises, with some distinction in respect of "treason". The same applies to layers b), c) and d). Layer e) eventually requires differentiating the conduct between the bribe giver and taker.

The involvement of higher-level officials follows similar patterns and, based on the relevant criminal law system, may determine different shades of liability, from directing or ordering the commission of a crime under layers a) to e), to committing such offences "through" the spy, to conspiracy with spy abroad to commit such crime, to participating in a criminal enterprise … up to ancillary forms of liability for procuring means for the commission of the crime. Looking at the practice of cyber espionage, an additional layer for money laundering may be added if the relevant provision covers transfer of monetary funds with the intent to carry on a criminal activity.

It should also be considered that under most criminal law systems the conduct of those participating abroad to the commission of a crime by means of others or aiding others is "territorial" under to rules on the *locus commissi delicti*.

International practice is scarce and this presentation was originally intended to start from the German post-reunification cases. A second guess led to a prudent check to the thoughts of the ancient masters of international criminal law. *H. Donnedieu De Vabres* - who became on of the two French judges at the IMT - in his 1928 book about *Modern Principles of International Criminal Law*[23] while dealing with the territorial and personal ambit of application of criminal provisions on espionage and treason (specifically the crime of *Landesverrat* under German Law), mentions the 1887 *Affaire Schnoebele*, a French police commissioner posted at the French – German borders at the railway junction of *Pagny – sur – Moselle*. *Schnoebele* was lured some metres within German territory by his German colleague and police commissioner and captured by two disguised German police officers enforcing an arrest warrant for espionage of the Leipzig Court[24]. *Schnoebele* was able to escape and was subsequently re-arrested by German police in French territory and returned thereof. He was subsequently released when tensions between the two bordering Countries escalated and almost caused a war, as his arrest upon invitation on German soil was held to be irregular. The case was discussed at the time as an example of application of German criminal law to foreigners abroad.

*Schnoebele'*s alleged espionage activity against Germany was conducted - even according to German sources - from inside the French borders. In particolar, some letters exchanged with a spy arrested in Germany and charged with having handed over to a foreign power information about plans and fortifications led to the involvement as an accomplice of *Schnoebele*. He apparently acted as an intermediary with an official *déjà connu par la Cour supreme de l'empire, comme chef du bureau francais d'information à Paris, à cause des procès de haute trahison dirigés contre le capitaine danois Sarawt et contre le journaliste Prohl"*[25]*.* Upon the release, an official note directed

[23] H. DONNEDIEU DE VABRES, *Les Principes Modernes du Droit Pénal International*, Librairie du Recuel Sirey, 1928, p. p. 98.
[24] A legal analysis of the case (at least from a French perspective) may be found in É. CLUNET, *Questions de droit relatives à l'incident franco-alemand de Pagny (affaire Schnaebele)*, Marchal & Billard, 1887.
[25] Note by the German Ministry of Foreign Affairs published in É. CLUNET, *Questions de droit relatives à l'incident franco-alemand de Pagny (affaire Schnaebele)*, p. 12.

by the Bismarck to the French ambassador in Paris confirmed that the release did not imply the dropping of the charges and the proceeding could continue in *absentia*[26].

The French official referred to was colonel François-Honoré Vincent, the head of the "Statistical Section" of the French Army until 1886. The Danish captain's name was wrongly typed and the reference was to former Danish officer and military historian and writer Christian von Sarauw, sentenced in 1886 to twelve years for treason for bribing German officials in order to obtain sensitive information. The plot involved also former Prussian officer, Augustus Sydney O'Danne[27] later extradited to Germany from Switzerland for blackmailing and attempted fraud.

More than fifty years later, in 1939 in the so-called "Venlo incident"[28], the German SD (*Sicherheitsdient*) and Gestapo lured two british intelligence officers at the immediate vicinity of the border between the Netherlands and Germany and in the immediate aftermath of the *Burgerbreukeller* attempt to kill Hitler, abducted into German territory. The incident did not become a case in a German court. Nevertheless, the idea to charge the british intelligence officers for treason was considered on the side of Germany, although with the purpose of involving Britain in the attempt to kill Hitler[29]. As known Georg Elser who planned and carried out the failed assassination plan was never trailed.

After the German Reunification, among the different intriguing aspect the transitional process perhaps one of the most challenging besides "judicial torts'' and the prosecution of former judges and prosecutors was that of those higher-level officials active in the *Hauptverwaltung Aufklärung* (HVA) of the *Ministerium für Staatssicherheit* (MfS) in the territory of the former DDR – GDR. The said officials were in charge for the "insight" in the activities of Departments of the FRG as the Ministries for foreign affairs and the Ministry of defence and obviously their (then) adversary services in the intel community (*Bundesnachrichtendienst*, *Militärischer Abschirmdienst*, *Verfassungsschutz*). Their roles encompassed the approval of the planning of tactical operational activities as approaching officials engaged in one of the targeted organisations or infiltrating those organisations with agents often identified with codenames as, for example the famous "*Asriel*" and "*Aurikel*". Their *job description* also encompassed assessing and analysing information obtained and approving budgetary decisions in respect of remuneration or "bribes'' for agents and traitors.

The German criminal code has always been a thoughtful piece of legislation and directly resolves issues which in other countries – reference is to Italy – are long debated and hyper-complicated by scholars. Under § 9[30], II, of the German criminal code, dealing with the *locus*

[26] Published in É. CLUNET, *Questions de droit relatives à l'incident franco-alemand de Pagny (affaire Schnaebele)*, p. 20, fn. 3.

[27] Reference in FRIEDRICH VON HOLSTEIN, *The Holstein Diaries*, edited by N. RICH – N.M. FISHER, Cambridge University Press, 1957, p. 284.

[28] The reference to the *Venlo incident* was suggested at the Conference to the author by BEREND ELTJO STUIT to whom I am thanful.

[29] S. PAYNE BEST, *The Venlo Incident. A true Story of Double-Dealing, Captivity, and a Murderous Nazi Plot*, Frontline Books, London, 2009, p. 41, reproducing a dialogue of S. Payne Best with Kriminalrat.Schäfer (sometimes referred to as Karl Schäfer): «*Don't you worry yourself about what that officer said to you yesterday. You won't be badly treated, but you may be placed on trial on a charge of* Landesverrat *(treason). The Fuhrer has taken you under his personal protection and no one can do anything to you except on his orders; you seem to have very good friends in Germany. I have been given the task of examining you and I must report the result to the '*Reichsrat*' … who will decide whether you can be placed on trial*».

[30] § 9 - Place of commission of offence.

"(1) An offence is deemed to have been committed at every place where the offender acted or, in the case of an omission, was required to act or in which the result, if it is an element of the offence, occurs or was to have occurred as envisaged by the offender.

(2) Acts of participation are not only committed at the place where the offence was committed, but also at every place where the participant acted or, in the case of an omission, was required to act or where, as envisaged by the participant, the offence was to have been committed. If the participant to an offence committed abroad acted within the territory of the Federal Republic of Germany, German criminal law applies to the participation even if the act is not a criminal offence according to the law of the place of its commission.

commissi delicti, "acts of participation are not only committed at the place where the offence was committed, but also at every place where the participant acted or, in the case of an omission, was required to act or where, as envisaged by the participant, the offence was to have been committed". The provision linked, as ascertained in the court cases underlying the application to the Constitutional Court, the participation in the offences by those in the HVA to the territory of the FRG[31].

The judgement shows an interesting approach to the topic of espionage, deepened in the circumstance by an expert opinion requested to the *Max Planck Institut für ausländisches öffentliches Recht und Völkerrecht in Heidelberg*. The case also highlights the relevance of the concurrence with purely treason and espionage related offences of the "corruption" of the agent as a public official taking bribes.

Apart from the singularities of German reunification, the German Constitutional Court considered that "*the extension of the criminal liability to such acts, in which the perpetrator acted exclusively abroad, violates neither the Constitution nor the general rules of international law that would have to be observed under Article 25 of the Basic Law*". Nor are spies afforded with immunity under international law, except those situations falling under the Vienna Conventions on diplomatic relations. The latter effectively do not seem to prevent a prosecution once the conditions for *ratione personae* immunity are no longer given.

The Constitutional Court further considered that "*in the view of the Basic Law, in particular the basic rights guaranteed therein, the extension of criminal liability to foreign offences is legitimised by the fact* [that they] *serve to protect the freely constituted Federal Republic of Germany from the outside and are therefore intended to guarantee the freedom that makes guarantees of basic rights possible in the first place and let it unfold*"[32].

The "double standard" enshrined on one side in the establishment under criminal law of a protection against foreign espionage and, on the other side, in the resorting to espionage and the shielding of own structures and agents from foreign prosecution by making foreign offences by them not-subject to passive extradition is acknowledged by the Constitutional Court. "It therefore corresponds to the "material regulations'' of state security law that it always protects only one's own State against foreign espionage and at most includes certain allies in this protection, while on the other hand the activities of one's own secret services serving the protection and interests of one's own state are not regarded as punishable"[33].

The outcome of the decision was the plaintiffs could not be punished in the light of the singularities of the German reunification; such a punishment would infringe the constitutional principle of proportionality (*Verhältnismäßigkeitsgrundsatz*).

Although the outcome of the case and the assessments of the Court therein refer to the specific situation, some of the Court's remarks are worth being considered for their general purpose.

The Court held that generally "*the state uses criminal law to punish actions that go against an ethical minimum*". By contrast, "*acts of espionage are legally ambivalent*":

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[31] The judgment clarifies that the territoriality of the conduct was equally established for *plaintiff* G. and "his participation to the conduct of his agents in the FRG amounting to treason of the Country" (*Das gleiche gelte gemäß § 9 Abs. 2 StGB für Teilnahmehandlungen G… an dem von einem seiner Agenten in der Bundesrepublik begangenen Landesverrat*).

[32] § 165, „*Die Erstreckung der Strafbarkeit derartiger Taten, bei denen der Täter ausschließlich im Ausland gehandelt hat, verstößt weder gegen das Grundgesetz noch gegen allgemeine Regeln des Völkerrechts, die nach Art. 25 GG zu beachten wären. Vor dem Grundgesetz, insbesondere den darin verbürgten Grundrechten, legitimiert sich die Erstreckung der Strafbarkeit auf Auslandstaten dadurch, daß die §§ 93 ff. StGB dem Schutz der freiheitlich verfaßten Bundesrepublik Deutschland nach außen dienen und damit den Freiraum verbürgen sollen, der Grundrechtsgarantien überhaupt erst ermöglicht und sich entfalten läßt*".

[33] § 169, „*Es entspricht demzufolge der Sachgesetzlichkeit des Staatsschutzrechts, daß es stets nur den eigenen Staat gegen fremde Spionage schützt und in diesen Schutz allenfalls noch gewisse Verbündete einbezieht, dagegen die dem Schutz und den Interessen des eigenen Staates dienende Tätigkeit der eigenen Geheimdienste nicht als strafbar ansieht*".

They are useful to those conducting them and represent a permitted activity, without being prevented from this evaluation by general, internationally recognized principles of the rule of law or human rights.

As observed by the Court, espionage harms the state being spied on. For such a state espionage is a punishable injustice. Nevertheless, "*since he himself engages in espionage, his claim for punishment against foreign spies is not justified by a general socio-ethical disparagement of espionage activities as such, but solely by the protection of his own state - which is admittedly not indifferent in terms of social ethics*"[34].

The "patterns" used in the German post-reunification prosecution of second row, higher level planners and approvers of espionage operations remained a singularity not because of the legal principles applied under criminal law, but rather because of two factual aspects:

- it never happened again that one State exercised full jurisdiction over the entire human element of the former opponent apparatus (apart from situations settled under the "fog" of military occupation);
- It never happened again that a systematic prosecution of the (former) opponent's apparatus did not entail the risk of retaliation and escalation of criminal prosecutions into a judicial warfare.

A subsequent case, apparently without an overt follow up, can be spotted on the background of the so-called *Jadhav case - India v. Pakistan* - decided by the International Court of Justice[35]. While the core of the controversy was represented by consular access under the Vienna convention on consular relations to the arrested Indian citizen, accused of espionage and terrorism, Pakistan alleged to investigate the surrounding of the charges. According to Pakistan, in the "*process of investigation and interrogation, the said accused* [had] *revealed the names of the following handler organisations/persons/accomplices, facilitators and co-conspirators*". The said individuals were (all but one) named and were assigned to the Indian intelligence service (*RAW - Research and Analysis Wing*) and Naval Intelligence. Their statements were requested by a "Letter of Assistance for Criminal Investigation"[36] with the Registration of the criminal case against the "handler organisation", accomplices and facilitators. In its counter- memorial, Pakistan asserted that the "Letter of Assistance" remained unanswered by India[37]. India on his own alleged to ha expressly rejected the request for judicial assistance mere propaganda and posturing[38].

As mentioned previously, the case is out there with no signs of ongoing activity. In its silent status the investigations in respect of the accomplices and facilitators in India does not seem to have driven a distinction between those accuses related to alleged terrorist aimed at destabilizing Pakistani Baluchistan and espionage as such.

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[34] § 192, "*Dem ausgespähten Staat schadet die Spionage; für ihn ist sie strafbares Unrecht. Da er selbst Spionage betreibt, rechtfertigt sich sein Strafanspruch gegenüber ausländischen Spionen nicht aus einem allgemeinen sozial-ethischen Unwerturteil über die Spionagehandlungen als solche, sondern allein aus dem - freilich sozialethisch nicht indifferenten - Schutz des eigenen Staates*".

[35] International Court of Justice, The Republic of India v. the Islamic Republic of Pakistan, *The Jadhav case*, Exhibits by Pakistan, December 13, 2017, Vol. II, Annex 17.

[36] *Letter of Assistance for Criminal Investigation against Indian National Kulbhushan Sudhair Jadhev*, transmitted by the Ministry of foreign Affairs of the Islamic Republic of Pakistan to the High Commission of India in Islamabad, on January 23, 2017.

[37] International Court of Justice, The Republic of India v. the Islamic Republic of Pakistan, *The Jadhav case*, Counter-memorial by Pakistan, December 13, 2017, § 263-265.

[38] Reply by India in the Jadhav case april 17, 2018: "*Besides, its letters of request for legal assistance facially are propaganda documents rather than any serious request for investigating a crime. Beyond disclosing the First Information Report (FIR), even at this stage Pakistan fails to disclose the evidence that has been produced before its Military Court (other than the contrived confession) and on the basis of which the court has found it appropriate to convict Jadhav and award him the capital punishment. The request for cooperation in investigation is farcical and merely an exercise in posturing*".

The "foreign tail of domestic conducts" was preventively cut out in the investigations in the United States in the case of the Chinese "Foxhunt case" dealing with an operation launched in the PRC by the Central Commission for Discipline Inspection (the "CCDI") as a part of a larger anti-corruption effort, to forcibly return fugitives in China without engaging U.S. authorities for cooperation under existing agreements. In the case, Chinese officials harassed Chinese accused in their home country of bribery and embezzlement of funds and residents of the United States in order to coerce them to return to China[39]. Defendants in the case involving charges of conspiracy under the FARA and to engage in "interstate stalking", obstruction of justice are, among others, a Chinese policeman and a prosecutor active on the soil of the United States. The indictment mentions, not as defendants, also "Official #1" and "Official #2" respectively the director and an employee in the Wuhan Procuratorate which represented the second row and the higher level officials discussing the rendition scheme with the defendants prior to the commission of an overt act. Official #1 eventually instructed the defendants during the execution of their criminal scheme.

5. The prosecution of foreign spymasters and legal constraints

Cyber-espionage and the participation from beyond the border in "old-fashioned trench coat espionage" does not differ too much when it comes to rooting the conduct in the territory of the targeted Countries.

The former may imply "ubiquity" of the conduct which is localised where information is stolen or extracted and the latter the consideration for the localization on the territory were the principal acted, conspired to act, was ordered to act, directed, aided and so on. Combining provisions on the *locus commissi delicti* and those on forms participation in the commission of a crime is in most criminal systems directly addressed by specific provisions; lacking specific provisions, the task is up to the jurisprudence.

"Old-fashioned trench coat espionage" may pose questions of qualified immunities - diplomatic or consular - of men wearing the trench coat. Such immunities do not "extend" to the spymasters directing the latter ones. For the purpose of this presentation, it suffices to say that diplomatic immunity is granted *ratione personae* and is terminated when the agent is - as mostly happens - expelled and leaves the territory of the host Nation. In a broader construction of such immunity, the expelled agent should be permitted to reach his/her sending State without seeking his apprehension while in transit in a third State where he/she is not accredited.

Much more critical is the question of immunity derived from Sovereign State immunity, as the topic triggers another "*Hegelian*" impulse. The question is common to cyber-espionage and trench coat espionage. Immunity represents a topic on itself and deserves a separate examination.

Both prosecution of cyber-espionage and trench coat espionage may be hampered by the political offence exception when extradition is sought. At least if the involved Countries do not share mechanisms as the European Arrest Warrant.

The topic of the "political offence exception" or bar to extradition is characterised by an immense legal literature[40]. Espionage and treason are held to "affect peace and security of a State without containing any element of an ordinary crime"[41]. Espionage and treason are often

[39] United States District Court for the Eastern District of New York, *United States, v. Hu Ji et al*., superseding indictment filed on July 21, 2021, case 1:21-cr-00265-PKC.

[40] At this purpose, *See* recently Deutscher Bundestag, Auslieferung an Drittstaaten, 2019 WD 3 - 3000 - 174/19, p. 10, "*zu den klassischen politischen Delikten gehören Taten, die sich unmittelbar gegen die politische Ordnung eines Landes richten, gegen die innere oder äußere Sicherheit, den Bestand, die politische Organisation oder Verfassung eines Staates oder gegen die Regierung. Zu diesen Delikten zählen beispielsweise Hochverrat oder Spionage".* The characterization of espionage and treason as political offences may be found in the *Harvard Research in International Law, Extradition*, in *American Journal of International law*, Vol. n. 29 (1929), Supplement n. 35, p. 113.

[41] In scholarship, *See* M.R. GARCIA - MORA, *Treason, Sedition and Espionage as Political Offenses under the Law of Extradition*, in *University of Pittsburgh Law Review*, Vol. n. 26, (1964-1965), p. 65.

characterised as "purely political offences" and therefore almost constantly excluded from being listed as extraditable offences under "older" extradition treaties containing lists of offences.

Which also causes a lack of significant case law[42]. This is also the reason why the relevant jurisprudence on the extradition of spies deals with proxy cases rather than with real espionage cases and most quoted decisions either deal with other than spies as *Quinn v. Robinson* (U.S. Courts of appeals) or with conduct by a non-spy surrounding a prior act of espionage as Bourke v. Attorney General[43]. In the latter case England sought the extradition of Sean Bourke, an Irish citizen who helped a spy (former British diplomat George Blake convicted for spying for Russia) escaping prison.

The case of the already mentioned Augustus Sydney O'Danne shows more proximate to the core question. He was extradited to Germany from Switzerland for blackmailing and attempted fraud[44]. In the extradition proceeding he claimed to be sought for his responsibility in espionage and treason in favour of France. Based on a factual statement submitted by the Amtsgericht Berlin, apparently O'Danne tried to raise some cash out of his prior involvement in spying for France. He was accused for having attempted, while operating from Switzerland, to obtain a payment by the German Military attaché in France, in exchange of information about spies within the German officials and subsequently omitted to send the requested information and evidence. The *Bundesgericht* rejected the political offence exception[45]. Apparently also Willy Kranz, spying for Germany from Liechtenstein in Switzerland and sentenced to death *in absentia* in 1944 in the latter Country for treason was subsequently … extradited by the Allied occupying powers.

The typology of spies under the political offence is initially examined with respect of "new typology of spies" (mercenaries, alienated, buccaneer, professional, compromised, quasi agent, escapee), moving from the original idea, but without re-examining the original rationale[46].

The political nature of an offence, when not purely political" is also subject to "tests" in the shape of the French "objective" test, the Swiss proportionality, predominance test, and the Anglo-American "incidence" test.

The *rationale* underlying the political offence test is the rather "romantic" approach to the reflecting the French and American revolutions and the right of individuals to resort to political activism in their struggle for liberation from subjugation and independence; Perception accompanied by the sympathy for unsuccessful rebels and the avoidance of interferences with foreign internal political confrontations.

It should also be observed that espionage and treason as purely political offences reflect rather than the essence of the conduct, the misuse and abuse of charges for espionage and treason over the centuries. Probably in any revolution, revolutionaries and rebels are not, at a certain stage of their struggle, linked to foreign powers.

Public officials working within the intelligence of one State and spying on other States lack the "individual" characterization of activism and also the rationale for protection. One could eventually distinguish the position of foreign officials involved in espionage from the traitors or even shortcut all those situations in which no internal disorders, insurgence or political struggle is involved.

The recent Julian Assange extradition case adds unfortunately a further significant degree of ambiguity to the debate. The Magistrates Court committed Julian Assange for extradition in April 2022. The political offence exception to extradition was examined in January 2021 when he was first

[42] United States Court of Appeals, Ninth Circuit, Quinn v. Robinson, decided on February 18, 1986,783 F.2d 776, §§ 50, 53.

[43] Ireland Supreme Court, *Bourke v. Attorney General,* decided on January 1, 1968 No. 2544 P..

[44] Bundesgericht, 13 July 1888, in *Revue Pénale Suisse*, 1888, p. 510ff.

[45] The decision is quoted by L.L. DEERE, *Political Offenses in the Law and Practice of Extradition*, in *The American Journal of International Law*, Vol. n. 27 (1933), n. 2, p. 247.

[46] At this purpose, See H. HAGAN, *Espionage as a Political Crime? A Typology of Spies*, in *Journal of Security Administration*, Vol. n. 12, (1989), p. 19ff.

discharged for his mental conditions under Section 91 of the Extradition Act (2003)[47]. Assange's defence argued that the offence Assange was sought for - espionage under 18 U.S.C. Ch. 37 - was a "purely political offence" and that the 2003 UK-US Extradition Treaty prohibits extradition for a political offence. The lawyers for the U.S., instructed by the Crown Prosecution Office, responded by arguing that the Extradition Act (2003) does not reproduce a political offence exception and create a "self-contained regime for extradition" not altered by a Treaty unless incorporated by statute. Further, according to the United States, the statute did not contain any device for the incorporation of the treaty and that therefore the Magistrates Court, had not the power to enforce the terms of the latter. The arguments raised by the parties and specifically those of the requesting State in the case reflect the specific features of the U.K. Constitutional law as to the "dualist" relationship between statutes and treaties as well as technicalities under the Extradition Act (2003). Nevertheless, the arguments raised by the U.S. to counter the political offence claim without entertaining in depth the merits of the claim seems rather double bladed. According to the U.S. "*any political offence exception would not apply in any event*" as "*Wikileaks which describes itself as an "intelligence agency of the people", was engaged in obtaining classified materials from numerous countries, it was not locked in a battle with a single state as classically described by the authorities on political exception*". The *forum* and the features of the requested State in extradition proceedings deeply influence the legal arguments made by the parties. In any case, the distinction made by the U.S. in the *Assange* extradition case is probably the best argument for asserting a political offence exception to the extradition of spies. District Judge *Baraitser*, shared the view that the removal of the political offence bar in the Extradition Act (2003) was "*a clear indication that Parliament no longer intended for the protection to be available … nor should the court re-instate the protection*". The Judge also held that there was "no need for me to determine whether the allegations in this request amount to "political offences''. The January 2021 decision of the Magistrates Court was appealed at the High Court by the U.S.. The appeal proceeding focussed on the ground for discharging *Assange* under Section 91 of the Extradition Act (2003) and the political offence exception was no longer entertained.

The High Court in December 2021 quashed the discharge and remitted the case to the Westminster Magistrates' Court, with a direction to proceed as the District Judge "*would have been required to do if she had decided differently the relevant question of whether Mr Assange's mental condition was such that it would be oppressive to extradite him, namely by sending the case to the Secretary of State*"[48]. The High Court remanded Assange in custody. The Magistrates Court subsequently committed Assange for extradition on April 20, 2022.

Some years earlier the Hong Kong special administrative region failed to extradite *Edward Snowden* who was also sought *inter alia* under Chapter 37 apparently because his middle name was wrongly typed in the extradition request[49]. The mishap allowed *Snowden* to depart Hong Kong without raising a political exception under the relevant extradition treaty.

Finally, on March 22, 2022, the *Oberlandesgerich Brandenburg* committed for extradition to Britain, on charges of espionage a British citizen, David Smith, formerly employed at the British Embassy in Berlin.

[47] District Judge (Magistrates' Court) Vanessa Baraitser In the Westminster Magistrates' Court Between: The United States of America v. Julian Paul Assange, 4 January 2021.

[48] United States v. Assange, Judgement, December 10, 2021, [2021] EWHC 3313 (Admin), https://www.judiciary.uk/wp-content/uploads/2021/12/USA-v-Assange-judgment101221.pdf.

[49] M. D. KIELSGARD – K. GEE-KIN IP, *Hong Kong's Failure to Extradite Edward Snowden: More Than Just a Technical Defect*, Richmond Journal of Global Law & Business, vol. n. 13, (2014), p. 41ff.,: http://scholarship.richmond.edu/global/vol13/iss1/3.

6. Towards a conclusion

The reasons for an asymmetry between the prosecution of cyber espionage and trench coat espionage and those participating in the crime from abroad may not be merely legal, as as criminal law principles applied do not differ that much. There are rather reasons of convenience and policy as the prosecution of spymasters for conduct of subordinate trench coat spies may:

- involve secrecy of information obtained by third parties determining the eradication of spying rings (which may be embarrassing as third party warnings are evidence of failures);
- require an assessment of information gathered by the spying ring and spymasters (which may be embarrassing when third party information are involved;

Further, extradition request may require burdensome legal skirmish over political offence exceptions. Obviously, a prosecution cause retaliations and escalate to a full sized cross-prosecution. The need to avoid subjection to cross-prosecutions of daily espionage business should not be underestimated.

The prosecution for cyber-espionage is apparently more convenient as:

- provisions on economic – commercial espionage, as well as money laundering and ordinary computer crimes provide eventual coverage for political espionage when mail services are targeted, without requiring assessment of information gathered and political offence exceptions being raised.

The risk of a direct and “symmetric retaliation” could be lower in the case of economic espionage if the prosecuting State does not engage in similar conduct.

A Glance at the Margins: A Queer Eye on the Law of Armed Conflict

Uno sguardo ai margini:
una prospettiva *queer* del diritto di guerra

Matteo M. Winkler

Summary: 1. Introduction. – 2. Erasing Queer Bodies: The Queer Military Ban. – 3. The Marginalization of Male Rape. – 4. Prosecuting Queer People under Occupation Law. – 5. Conclusion.

1. Introduction

This article addresses an issue that only recently and to a limited extent has fallen under the radar of academic literature: the *queer* dimensions of the laws of armed conflict (hereinafter "LOAC")[1]. Queering the LOAC means to question its traditional dichotomic foundations (combatants/civilians, peace/war, male/female, homosexual/heterosexual, etc.) and subsequently discuss how non-cisgender and non-heterosexual bodies are marginalized, even erased, from armed conflict contexts[2].

While a solid literature exists on the queer dimensions of international law — common quotes in this regard led to Diane Otto's book *Queering International Law* (2018)[3] and a bunch of articles appeared on the 2022 special issue of *AJIL Unbound*[4] —, only a few have attempted to queer the LOAC specifically. In 2018, human rights practitioner Alon Margalit offered an articulated view of the condition of lesbian, gay, bisexual and trans* (LGBT) people under LOAC and international human rights law (IHRL). Combining LOAC and IHRL provisions, Margalit argued for an enhanced protection of LGBT people in armed conflicts based on the consideration that "negative sentiments against the LGBT community [that] are deeply rooted in domestic beliefs, practices and national law [are] likely to become more hostile and violent in circumstances of armed conflict"[5].

Furthermore, Uppsala University researcher Jim Jormanainen has empirically tested the hypothesis that the redistribution of resources generated by war economy in Ukraine and Moldova increased the opportunities for violence against LGBT people and created bubbles of impunity for the perpetrators[6].

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[1] This article reflects a presentation given at the twenty-second congress of the International Society for Military Law and the Law of War (ISMLLW) held in Palazzo Vecchio, Florence, between May 10 and 14, 2022 within a panel dedicated to gender awareness in the military. It has also been published, in a slightly different version, on *Articles of War*, the portal of the Lieber Institute of the U.S. Military Academy in West Point, New York.

[2] On queer theories see L. BERNINI, *Queer Theories: An Introduction. From Mario Mieli to the Antisocial Turn*, Routledge, New York, 2021, pp. 98-99.

[3] D. OTTO (Ed.), *Queering International Law. Possibilities, Alliances, Complicities, Risks*, Routledge, New York, 2018. Cfr. also D. OTTO, *Rethinking "Peace" in International Law and Politics from a Queer Feminist Perspective*, in *Feminist Review*, vol. 126 (2019), pp. 19ff. and *"Taking a Break" from "Normal": Thinking Queer in the Context of International Law'*, in *American Society of International Law Proceedings*, vol. 101 (2007), pp. 119ff.

[4] Cfr. the various contributions to *AJIL Unbound*, vol. 116 (2022), pp. 10ff.

[5] A. MARGALIT, *Still a Blind Spot: The Protection of LGBT Persons during Armed Conflict and Other Situations of Violence*, in *International Review of the Red Cross*, vol. 100 (2018), p. 237ff., p. 264.

[6] J. JORMANAINEN, *Does Armed Conflict Affect Violence Against the LGBT Community? A Comparative Study of Moldavia and Ukraine*, Uppsala Universitaet, 2018, available at https://www.diva-portal.org/smash/get/diva2:1289266/FULLTEXT01.pdf (retrieved July 26, 2022).

Both authors conclude that war adds new layers of vulnerability to the already fragile condition of LGBT people (this is also ILGA's and the EU Parliament's opinion)[7] but do not go as far as to intersecting this condition with a holistic view of LOAC under a queer lens. An attempt in this direction has been recently made by University of Western Australia law professors Philipp Kastner and Elisabeth Roy Trudel in an article of 2020 where they imagine a dialogic interaction between peace and queer theory[8].

To tentatively start a conversation on the subject, this article addresses three issues pertaining to the LOAC which challenge the common assumption that such law has no say about queer bodies and lives. The three issues are: the queer military ban, the prosecution of male-to-male and forced rape, and queer persecution under the law of occupation.

2. Erasing Queer Bodies: The Queer Military Ban

A common way to erase queer bodies is by preventing queer individuals from participating in the armed forces. LOAC does not do this directly let alone explicitly, with Article 43 of the Protocol Additional to the Geneva Conventions of August 12, 1949, indeed, being silent on matters such as recruitment, retention, and discharge[9]. However, by surrendering these matters to the states, the above provision offers a powerful normative backup to the heterosexual privilege of serving the nation, leaving state homophobia unbridled.

In fact, a queer military ban has been in force in several countries for over a hundred years, specifically targeting gay men, lesbians, and, more recently, trans*[10]. Introduced in late nineteenth century and first challenged in the 1980s, this exclusionary policy supported a narrative that labelled queer bodies as physically inapt, mentally instable, and socially awkward. This narrative, in turn, was functional to reinforcing the idea of nation as a body which must be kept physically strong, mentally health and socially united to ensure the best fighting capabilities. Since the very beginning, the underpinnings of this narrative, no matter how strong in the nation's collective imaginary, were based on an arbitrary, unjustified, and totally irrational form of discrimination.

The ban is a nineteenth-century invention. In the Classical Age, homoerotic relationships were commonly accepted within the military as they were in society. We now know, for example, that Achilles and Patroclus were lovers[11] and that the famous Thebes' Sacred Band, the elite squad made of 150 couples of lovers mentioned by Xenophon and Plato as one that "would be victorious even if they were but few against nearly all mankind"[12], was not just a myth but a pillar of the modern gay movement, inspiring classicists, poets and advocates of the caliber of John Addington Symonds, Walt Whitman, and Karl Heinrich Ulrichs, not to mention Oscar Wilde[13].

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[7] European Parliament, *Russia's War on Ukraine: The Situation of LGBTI People*, Doc. (2022) 729412, May 2022.

[8] Cfr. P. KASTNER, E. ROY TRUDEL, *Unsettling International Law and Peace-Making: An Encounter with Queer Theory*, in *Leiden Journal of International Law*, vol. 33 (2020), pp. 911ff., p. 913.

[9] Article 43 of the Protocol Additional to the Geneva Conventions of August 12, 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, so states: «1. The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict. 2. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities. 3. Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict».

[10] Cfr. G. ARKLES, *No One is Disposable: Going Beyond the Trans Military Inclusion Debate*, in *Seattle Journal of Social Justice*, vol. 13 (2014), pp. 459ff.

[11] Cfr. W.M. Clarke, *Achilles and Patroclus in Love*, in *Hermes*, vol. 106 (1978), pp. 381ff.

[12] Plato, *Symposium*, in *Plato in Twelve Volumes*, Vol. 9, Harvard University Press, Cambridge, 1925, para. 179a.

[13] Cfr. J. ROMM, *The Sacred Band: Three Hundred Theban Lovers Fighting to Save Greek Freedom*, Simon & Schuster, New York, 2021.

Throughout history, the violent repression of non-heterosexual sex inaugurated in the early Christian era showed an extraordinary resistance to change, with criminal prosecutions and convictions going up and down depending on specific cultural and geopolitical contexts. Yet, it's a matter of fact that neither the constant social, legal, and religious controls over queer bodies nor military discipline as such have ever been able to wipe homoerotic relationships out of the army entirely.

A key contribution to the construction of this modern anti-queer narrative comes from the case of Alfred Redl (1864-1913), chief of the military counterintelligence of the Austro-Hungarian Empire in the dramatic decade that preceded the First World War. Confronted by his superiors over large amounts of money he had secretly received from foreign correspondents, Redl shot himself in 1913. In searching his luxurious apartment, the police found evidence that Redl had passed sensitive information – fortification details, general mobilization plans and orders of battle – to Russia, the Empire's archenemy at the time; they also found, "perfumed love letters by the dozen, compromising photographs, wardrobes full of women's clothes, toiletries, and so on"[14].

Because Redl's homosexuality was quite well-known among the army's highest ranks, the government believed that Russia was blackmailing him in exchange of information. Although historians have later clarified that the Russians were unaware of Redl's homosexuality, the Austro-Hungarian government was more than happy to blame Redl and his "perverse" circle of lovers for the military disasters that ensued the start of the war in 1914, which had brought the imperial army short of collapse. The CIA first head Allen W. Dulles, himself an attaché to the US embassy in Vienna in 1916, would later claim that Russia espionage agents had "trapped [Redl] early in his intelligence career on the basis of two weaknesses — homosexuality and overwhelming venality"[15].

A myth was quickly built around Redl's sordid story, favored by a context where homoerotic feelings were sanctioned by religion, criminalized by the law, and pathologized by medicine, grounded on the related idea that discreet homosexuals were prone to being the perfect victim of blackmail.

Naval War College professor John R. Schindler observed that as "intelligence services worldwide cited Redl as sufficient grounds for excluding homosexuals from sensitive positions," the case spelling "the axiomatic belief that homosexuals are unfit for intelligence work, and are ipso facto security risks"[16]. Generals Werner von Blomberg, his peer Werner von Fritsch, and Günter Kiessling, all dismissed (in 1938 the former two and in 1983 the latter) at the apex of their careers upon allegations of homosexuality, have been prominent victims of this belief[17]. In 1950, the US Congress relied on Redl's case to conclude that homosexuals are "easy prey to the blackmailer, […] susceptible to the blandishment of the foreign espionage agent, [and] security risks in positions of public trust"[18] in order to exclude them from both civil and military services. This exclusionary policy would remain in force for sixty years until Congress eventually repealed President Clinton's "Don't Ask Don't Tell" regulation in 2010[19].

In connection with being presumed to be a security risk, queer people are also hypersexualized and depicted as uncontrolled sexual predators whose simple presence would jeopardize a unit's cohesion and combat effectiveness. While this idea has seemingly collapsed with the full inclusion of queer people in the military, traces of it remain in court reports from the past.

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[14] I.D. ARMOUR, *Colonel Redl: Fact and Fantasy*, in *Intelligence and National Security*, vol. 1 (1987), pp. 170ff., p. 180.
[15] A.W. DULLES, *The Craft of Intelligence*, New York, The New American Library, 1963, p. 118.
[16] J.R. SCHINDLER, *Redl — Spy of the Century?*, in *International Journal of Intelligence and CounterIntelligence*, vol. 18 (2007), pp. 483ff., p. 502.
[17] Cfr. K. STORKMANN, *« J'accuse »… en 1984 : Le limogeage expéditif d'un général ouest-allemand a rappelé l'affaire Dreyfus et le scandale Fritsch en 1938* , in *Guerres mondiales et conflits contemporains*, vol. 260 (2015), pp. 93ff.
[18] Interim Rep., S. Res. 280, 81st Congress (Dec. 15, 1950), 19.
[19] Pub. L. 111-321 (2010).

In *Steffan v. Cheney*, for example, the Columbia District Court qualified as "quite rational" the assumption that "with no one present who has a homosexual orientation, men and women alike can undress, sleep, bathe, and use the bathroom without fear or embarrassment that they are being viewed as sexual objects"[20]. As Martha C. Nussbaum ironically observed in her book *Sex and Social Justice* (1999), the same logic would apply to saunas, sport, and health clubs, where both male and female attendees get naked all the time and nonetheless "we do not observe an epidemic of muscular failure. Straight men do not leap off the treadmill or drop their barbells in panic"[21].

Today, in most countries of the world, gays, lesbians, and trans* are permitted to serve openly in the military. Each of these countries has a story to tell about how this development has eventually occurred, on occasion with the help of IHRL. In two rulings handed in 1999, the European Court of Human Rights declared enquiring one's sexual orientation within the armed forces to be a violation of the applicants' right to private life. In particular, the court concluded that "stereotypical expressions of hostility to those of homosexual orientation [and] vague expressions of unease about the presence of homosexual colleagues […] represent a predisposed bias on the part of a heterosexual majority against a homosexual minority" which are "[in]sufficient justification for the interferences with the applicants' rights […] any more than similar negative attitudes towards those of a different race, origin or colour"[22]. Rulings like these clearly help deconstruct anti-queer narratives.

Some countries, however, followed a different path. In India, after the 2018 Supreme Court ruling that struck down Section 377 of the Penal Code[23], Army Chief General Bipin Rawat rushed to clarify that same-sex relationships were still a punishable offence as a "disgraceful conduct of a [n …] unnatural kind" under Sections 45 and 46 of the *Army Act*[24].

Despite IHRL and astonishing developments at the national level, queer bodies are still unsafe in many places of the world, with LOAC effectively contributing to this result.

3. The Marginalization of Male Rape

Another way to erase queer bodies is by marginalizing or ignoring sexual assaults that do not follow the classical binary scheme of a male aggressor and a female victim. Here a queer view may help unveil a hypocrisy, or paradox, behind the crime of rape in international criminal law, which on the one hand insists on qualifying itself as "gender neutral" but on the other hand is hardly enforced when the victim is a man (*male rape*) or the defendant did not perpetrate the rape directly over the victim but forced another person to do it (*forced rape*).

For starters, rape's gender-neutral characterization is only a recent development in international criminal law. In the rare (and late) inquiries regarding the "Rape of Nanking" during Japan's occupation of the city, for example, none of the alleged 20,000 victims was male.

Things changed recently with the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (Art. 5(g)) and the International Criminal Tribunal for Rwanda (ICTR) (Art. 3(g)]), which name "rape" as a crime with no further specification. Although it is undisputed that the UN Security Council had "rape of women" in mind when they wrote the ICTY Statute (cf. the

[20] Steffan v. Cheney, 780 F. Supp. 1 (1991).

[21] M.C. NUSSBAUM, *Sex and Social Justice*, Oxford University Press, Oxford, 1999, p. 198.

[22] European Court of Human Rights, Case of Smith and Grady v. United Kingdom, Sept. 27, 1999, Nos. nos. 33985/96 and 33986/96, para. 97 and Case of Lustig-Prean and Beckett v. United Kingdom, Sept. 27, 1999, Nos. 31417/96 and 32377/96, para. 90.

[23] Navtej Singh Johar v. Union of India, Sept 6, 2018, AIR 2018 SC 4321.

[24] An Act to Consolidate and Amend the Law Relating to the Government of the Regular Army (Army Act), Act No. 46 of 1950, Sections 45 and 46.

preamble to Resolution No. 827 of May 25, 1993), both the ICTY and the ICTR clearly stated that rape could be committed against *a person* with no gender characterization[25].

Along the same line, the Elements of Crime relating to Article 7(1)(g) of the Rome Statute of the International Criminal Court (ICC), which punishes "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity", expressly states that all these terms are to be "intended to be broad enough to be gender neutral"[26]. One can therefore conclude that in positive international criminal law, rape is such even when the victim is a man. These are certainly welcomed developments.

And yet, in an article appeared in 2016, Maike Isaac has convincingly argued that there seems not to be much space for male and forced rape within the definition of rape under the ICTY or the ICC Statute[27]. She found, in particular, that whereas ten people (men) have been prosecuted for sexual violence against men and eight of them have been involved in forced rape (for forcing detainees to perform sexual acts on each other), only in two instances the tribunal had found that torture – not rape – had occurred because "certain detainees were forced to engage in sexual activities against their will"[28]. Apparently, the notion of "penetration" makes sexual assault a "rape" as a matter of statutory definition only if the defendant was involved in the act. This problem, Isaac noted, affects the ICC's Elements of Crime as well, bringing her to the conclusion that "the definition [of rape] is de facto not gender neutral[29]".

Properly addressing male and forced rape is a relevant part of the queer discourse within the LOAC and requires recognizing that sexual violence can take multiple forms, some of which do not abide by the traditional male-female, perpetrator-victim, penetrator-penetrated dichotomies. On this line of reasoning, Cambridge professor Sandesh Sivakumaran identified the main cause of the marginalization of these forms of sexual violence in the "taint of homosexuality," a rhetoric that transforms any touch between two persons of the same sex, especially men, into an implicit allegation of homosexual desire, although these persons have been *coerced*. According to Sivakumaran, the taint of homosexuality displays a powerful social influence by lowering the male victims' status to that ordinarily assigned to women, putting the victims in the unresolvable double bind of reporting a crime and having to suffer perpetual social ostracism or denying that the rape ever took place and grant immunity to the perpetrators[30].

Queering sexual violence against men during a war would help account for realities that the LOAC and its criminal law ramifications tend to relegate at the margin of the debate. As Sivakumaran rightly noted, re-centering the discussion on the sexual violence on male and forced rape would also offer both the women's and the queer movements new lands to explore and new arguments to fight against bias, stereotypes, and discrimination in different contexts, including in contexts of peace[31].

[25] Cf. Prosecutor v. Furundžija, Trial Judgement, IT-95-17/1T, Dec. 10, 1998, para. 186; Prosecutor v. Akayesu, Trial Judgment, ICTR-96-4-T, 2.9.1998, para. 688.

[26] Elements of Crime relating to Article 7(1)(g) of the Rome Statute of the International Criminal Court (ICC).

[27] M. ISSAC, *The Prosecution of Sexual Violence against Men in International Criminal Law*, in INTLAWGRRLS, Feb. 11, 2016, available at https://ilg2.org/2016/02/11/the-prosecution-of-sexual-violence-against-men-in-international-criminal-law/ (retrieved July 26, 2022).

[28] Cf. Prosecutor v. Sikirica et al., Trial Judgment, IT-95-8-PT, Nov. 13, 2001, para. 125; see also Prosecutor v. Simić et al., Trial Judgement, IT-95-9-T, Oct. 17, 2003, paras. 728-730.

[29] *Supra* note 27.

[30] S. SIVAKUMARAN, *Male/Male Rape and the "Taint" of Homosexuality*, in *Human Rights Quarterly*, vol. 27 (2005), pp. 1274ff.

[31] *Ibidem*, p. 1285.

4. Prosecuting Queer People under Occupation Law

A third field impacting queer bodies and lives is represented by that part of the LOAC that's Occupation Law. A key principle of this law is established by Article 43 of the 1907 Hague Regulations, which so reads:

> «The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in *his* power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country[32]».

This conservationist principle[33] is reinforced by Article 64 of the IV Geneva Convention of August 12, 1949, which imposes the occupying power the duty to maintain the existing criminal laws unless they "constitute a threat to its security or an obstacle to the application of the present Convention" and gives it the power to enact "provisions which are essential [for it] to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration" and lines of communication[34].

In his declaration following Russia's aggression of Ukraine on February 28, 2022, President Vladimir Putin has declared that one of the objectives of what he called "military special operation" was the "demilitarization and de-Nazification of Ukraine"[35]. As suggested by Marco Longobardo, senior lecturer at the University of Westminster, in a recent article on *EJIL Talk!*, the notion (or rhetoric) of de-Nazification has important legal implications under the LOAC – and the future of Ukraine. According to Longobardo, Putin's message implicitly referred to the historical precedents of Nazi Germany, Vietnam's invasion of Cambodia and Iraq's de-Baathification[36] and therefore what the Russian President is affirming is the occupying power's entitlement to dismantle the existing laws and replace them with harsher ones *beyond the constraints imposed by LOAC*. In other words, he's looking for an open exception to LOAC.

If operationalized, this exception would make the lives of queer Ukrainians unbearable to say the least. It is true that from the standpoint of the recognition of LGBT people's human rights, Ukraine appears to be very far from Western European countries like Denmark, Belgium, France, and Spain, which nowadays, *inter alia*, acknowledge marriage equality, offer solid protections against discrimination in the workplace, and prosecute anti-LGBT hate crimes and speeches. In other words, Ukraine is no queer Shangri-La.

According to the Rainbow Map 2022, a ranking compiled by the UN-accredited International Lesbian & Gay Association (ILGA), Ukraine scores 19%, a performance that is at similar level as that of its neighbors Romania, Bulgaria, Poland and Belarus but very distant from the most virtuous

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[32] Regulations Annexed to the Convention (IV) respecting the Laws and Customs of War on Land, The Hague, October 18, 1907, Art. 43, emphasis added: evidently, in 1907 the occupying power was *male*.

[33] Y. ARAI-TAKAHASHI, *Preoccupied with Occupation: Critical Examinations of the Historical Development of the Law of Occupation*, in *International Review of the Red Cross*, vol. 94 (2012), pp. 51ff.

[34] Article 64 of the IV Geneva Convention of August 12, 1949, so reads: «The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying Power in cases where they constitute a threat to its security or an obstacle to the application of the present Convention. Subject to the latter consideration and to the necessity for ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offences covered by the said laws. The Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfil its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them».

[35] Letter dated February 24, 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN Doc. S/2022/154, p. 6.

[36] M. LONGOBARDO, *The Rhetoric of 'Denazification' of Ukraine from the Perspective of the Law of Occupation*, in *EJIL: Talk! Blog of the European Journal of International Law*, April 26, 2022.

European countries. Russia's score, in the other hand, is 8%[37]. In fact, according to the Rainbow Index (the Map's empirical backup), Ukraine recognizes LGBT people certain rights in the public space that Russia, in contrast, denies altogether.

Yet, despite Ukraine's still low score according to European standards, we increasingly hear news of queer Ukrainians actively involved in war operations, including a special squad of gays, lesbians and trans* whose emblem, the unicorn[38], is the representation of the fact that fantastic (read: *queer*) creatures exist and are more and more visible in war contexts. In queer terms, the case of Ukraine connects the LOAC and the law of occupation with the destiny of queer bodies – another unexplored land ready for discovery.

5. Conclusion

This article represents a first, unstructured, and certainly incomplete attempt to queer the LOAC. It took inspiration from the Queering Accounting Manifesto, which calls for overcoming the dualities that characterize the field of accounting[39]. Similarly, this article calls for deconstructing the traditional views, categories and truths of the LOAC and look for unexplored corners of this field by starting with the condition of queer people. The basic consideration of the queer approach – the belief that if people do not fit the existing categories, it's the latter that needs to be reviewed, not the former – can only bring about new opportunities to understand the complexity of the world and of the LOAC itself.

[37] ILGA Europe, Rainbow Map 2022, available at http://www.ilga-europe.org/files/uploads/2022/06/rainbow-map-2022.pdf (retrieved July 27, 2022).

[38] H. GARCIA, *Ukraine's "Unicorn" LGBTQ Soldiers Head for War,* in *Reuters*, May 31, 2022, available at https://www.reuters.com/world/europe/ukraines-unicorn-lgbtq-soldiers-head-war-2022-05-31/ (retrieved July 27, 2022).

[39] A. GHIO, N. MCGUIGAN, L. POWELL, *The Queering Accounting Manifesto*, forthcoming on *Critical Perspectives on Accounting*, 2022.

Documentazione e giurisprudenza internazionale

a cura di Francesca Graziani

Crimini di guerra e prospettive di riforma[1]

War crimes and prospects for reform

Mariavaleria del Tufo

Sommario: 1. Per un Codice dei crimini internazionali. – 2. Il metodo. – 3. Crimini di guerra. – 4. La giurisdizione.

1. Per un Codice dei crimini internazionali

In questo contributo affronto il tema dei crimini di guerra e della giurisdizione nell'ambito dei lavori della Commissione Palazzo-Pocar[2], di cui ho avuto il privilegio di fare parte. Il 22 marzo 2022 un gruppo di esperti ha avuto dalla Ministra della Giustizia il mandato di elaborare un Progetto di Codice dei crimini internazionali, per procedere al completo adeguamento dell'ordinamento italiano allo Statuto di Roma sull'istituzione di una Corte penale internazionale[3].

Dopo aver concordato in Commissione alcune linee guida, il testo del Progetto, corredato dalle motivazioni, è stato elaborato, in forma di articolato, dalle Sottocommissioni, discusso in due sedute plenarie e, una volta attentamente supervisionato e riorganizzato dai Presidenti, trasmesso il 31 maggio alla Ministra Cartabia con una Relazione di accompagnamento[4], che sintetizza e ripercorre le ragioni delle scelte operate dalle Sottocommissioni.

La relazione è pubblica, e posso farvi tranquillamente riferimento; l'articolato, invece, non è stato ancora diffuso. Per evidenti ragioni di riservatezza, mi asterrò quindi dal fare riferimenti puntuali.

2. Il metodo

Prima di entrare nel merito, vorrei fare un accenno preliminare al metodo adottato dalla Commissione.

A ventiquattro anni dalla firma dello Statuto di Roma, la Commissione ha avuto il mandato di terminare in due mesi i suoi lavori.

I tristi tempi di guerra che stanno coinvolgendo anche il nostro Paese hanno reso non solo politicamente opportuno ma anche urgente l'adeguamento dell'ordinamento italiano allo Statuto della Corte penale internazionale. L'Italia infatti, dopo aver tempestivamente ratificato lo Statuto

[1] Il testo è la rielaborazione dell'intervento tenuto il 7 luglio 2022 nell'ambito del ciclo di incontri di formazione, organizzato dal Consiglio della Magistratura Militare, dal titolo *Giurisdizione penale e conflitti armati*.

[2] La Commissione è stata istituita presso il Gabinetto della Ministra della Giustizia con d.m. 22 marzo 2022. V. https://www.giustizia.it/giustizia/it/mg_1_8_1.page?contentId=SDC372746&previsiousPage=mg_1_8.

[3] Rome Statute of the International Criminal Court, adottato il 17 luglio 1998. Il testo dello Statuto, in italiano e in inglese, è riportato nella legge 12 luglio 1999, n. 232 Ratifica ed esecuzione dello statuto istitutivo della Corte penale internazionale, con atto finale ed allegati, adottato dalla Conferenza diplomatica delle Nazioni Unite a Roma il 17 luglio 1998. Delega al Governo per l'attuazione dello statuto medesimo. (GU Serie Generale n.167 del 19-07-1999 - Suppl. Ordinario n. 135). Lo Statuto, a livello internazionale, è entrato in vigore il 1 luglio 2002, al raggiungimento della sessantesima ratifica, come stabilito dall'articolo 126. Il 26 gennaio 2022 l'Italia ha depositato presso le Nazioni Unite lo strumento di ratifica, firmato dal Presidente della Repubblica il 22 dicembre 2021, degli emendamenti allo Statuto istitutivo della Corte penale internazionale, adottati a Kampala il 10 e l'11 giugno 2010, sul crimine di aggressione e sui crimini di guerra. Lo Statuto, a livello internazionale, è entrato in vigore il 1 luglio 2002, al raggiungimento della sessantesima ratifica, come stabilito dall'articolo 126.

[4] Il testo è consultabile on line, https://www.giustizia.it/cmsresources/cms/documents/commissione_PALAZZO_POCAR_relazione_finale_31mag22.pdf.

con la l. 232/1999[5], ha poi proceduto a un adeguamento parziale, limitandosi ad assicurare, su espresso obbligo pattizio, soltanto i rapporti di cooperazione con la Corte[6].

Il nostro ordinamento non dispone, quindi, degli strumenti necessari per instaurare un procedimento penale nei confronti del presunto autore di un crimine internazionale.

In mancanza di una trasposizione, l'Italia non può esercitare la propria giurisdizione perché le fattispecie di reato previste dalle nostre leggi non sarebbero in grado di attrarre, se non in alcuni casi e prescindendo dal contesto, le fattispecie concrete sussumibili nei crimini internazionali descritti dallo Statuto. Proprio in ragione di questa mancanza o di questa attrazione impropria e inadeguata, se si presentasse un caso, la Corte Penale Internazionale dovrebbe operare in funzione sussidiaria rispetto alla giurisdizione italiana e avocare a sé il procedimento sulla base del principio di complementarietà di cui all'art. 17 dello Statuto[7].

Compito primario della Commissione è stato quello di strutturare una normativa organica di precetti e sanzioni, ma anche di elaborare norme a carattere più generale, che permettano all'Italia di disporre di strumenti completi ed efficaci per instaurare il giudizio e portarlo a termine.

Teoricamente l'adattamento avrebbe potuto seguire due strade.

Una prima avrebbe portato a inserire una serie di disposizioni che provvedessero ad attuare lo Statuto *all'interno del codice penale*. Una opzione prescelta da numerosi Paesi, molti dei quali a noi vicini, come ad esempio la Francia. Si sarebbe potuta cogliere l'occasione per procedere alla creazione di un Titolo specifico, in cui immettere anche altri reati che non rientrano nello Statuto, ma che derivano comunque da obblighi internazionalmente contratti da parte dello Stato e che sono stati inseriti nell'ordinamento in ordine sparso. Una riforma organica, quindi, all'interno del Codice, nel rispetto della riserva di codice di cui all'art. 3 *bis* c.p. Ma probabilmente sarebbe stato un lavoro troppo lungo e complesso, e comunque ingestibile in soli due mesi.

Un'altra via, che era già nel mandato della Commissione, consisteva nell'approntare un Codice dei crimini internazionali, sul modello tedesco, che adeguasse l'ordinamento allo Statuto, organizzando un *corpus* normativo omogeneo in cui fossero ricomprese, oltre alle fattispecie di reato, anche disposizioni di parte generale che richiedessero una puntualizzazione, *ratione materiae*, rispetto al sistema codicistico. L'autonomia del Codice dei crimini internazionali, contenendo *disposizioni …inserite in leggi che modificano in modo organico la materia*, risulta rispettosa anch'essa dell'art. 3 bis c.p. Lo strumento codicistico è evidentemente risultato più agile, più mirato, più omogeneo, più di impatto, anche in considerazione del forte valore simbolico di cui esso si fa portatore nell'attuale momento storico.

La Commissione è andata più avanti dello stesso Statuto, ha infatti scritto i crimini alla luce della giurisprudenza della Corte e ha aggiornato alcune fattispecie ai più recenti standard del diritto internazionale.

Il Codice non rappresenta però un sottosistema penale eccentrico. La regola è stata quella di tendere alla creazione di un insieme di disposizioni il più armonico possibile rispetto alla normativa vigente. Ne è risultata una scrittura delle norme sensibile allo Statuto, al diritto internazionale, rigorosamente orientata alla Costituzione e attenta all'utilizzo di una terminologia giuridica nota agli operatori. Inoltre, per evitare inopportune distonie, sono state tenute presenti

[5] Legge 12 luglio 1999, n. 232, Ratifica ed esecuzione dello statuto istitutivo della Corte penale internazionale, con atto finale ed allegati, adottato dalla Conferenza diplomatica delle Nazioni Unite a Roma il 17 luglio 1998, entrata in vigore il 20 luglio 1999.

[6] V. legge 20 dicembre 2012, n. 237 Norme per l'adeguamento alle disposizioni dello statuto istitutivo della Corte penale internazionale.

[7] L'articolo 17 dello Statuto, *Questioni relative alla procedibilità*, stabilisce che la Corte dichiara improcedibile il caso se sullo stesso sono in corso di svolgimento indagini o provvedimenti penali condotti da uno Stato che ha su di esso giurisdizione*, a meno che tale Stato non intenda iniziare le indagini ovvero non abbia la capacità di svolgerle correttamente o di intentare un procedimento.*

le soluzioni normative adottate negli altri Paesi. D'altra parte se l'adeguamento, di tipo verticale, favorisce normalmente e per *default* un'armonizzazione di tipo orizzontale tra ordinamenti, mettere mano alla scrittura di un testo normativo nella consapevolezza di queste dinamiche non può che generare effetti virtuosi, soprattutto laddove si tratti di organizzare sistemi giuridici il più allineati possibile funzionalmente alla repressione di taluni crimini.

Se la Commissione ha lavorato sincronicamente all'esistente, la dimensione diacronica non è tuttavia mancata: l'attuale Progetto di codice è stato preceduto da alcuni altri importanti Progetti[8], evidentemente non tradottisi in legge, che sono tornati molto utili nello studio e nella preparazione del testo finale.

Un rapido accenno alla tecnica di scrittura. Una delle differenze tra lo Statuto di Roma e la Proposta di codice per i crimini internazionali consiste nella descrizione delle fattispecie. Lo Statuto oscilla tra l'uso di una tecnica normativa casistica e l'impiego di formule più che sintetiche. Se, con un'operazione impropria, lo Statuto dovesse essere valutato alla luce delle categorie costituzionali che presidiano il nostro diritto interno, il principio di legalità, *sub specie* dei canoni della determinatezza e della precisione, non apparrebbe sufficientemente rispettato. Ma il testo statutario è destinato a essere applicato da giudici internazionali, che ragionano secondo criteri più elastici e ricostruiscono i precetti attraverso altri schemi ermeneutici, e altri approcci, come dimostra la giurisprudenza delle Corti.

Il Codice dei crimini internazionali è invece destinato a operare nel contesto nazionale, funzionando all'interno di un sistema complesso di cui è parte integrante, e di cui deve rispettare non solo i principi, ma anche le dinamiche e le interconnessioni. I crimini internazionali, una volta immessi nell'ordinamento, devono uniformarsi alle sue regole. Inoltre il Codice è uno strumento normativo pensato per i giudici nazionali, che devono evidentemente potersi avvalere delle categorie con le quali solitamente lavorano. In questa logica si è inserita anche la scelta di procedere a una sistematizzazione del testo secondo un lessico noto: titoli, capi, sezioni, articoli.

3. Crimini di guerra

I crimini di guerra hanno avuto una storia particolare. Con il generoso supporto di una Sottocommissione *ad hoc*, sono state attentamente esaminate le fattispecie esistenti nel sistema interno che sono state trasposte dalla sedi originarie[9] al Codice dei crimini internazionali, operazione imprescindibile per fondarne una strutturazione organica.

Ma procediamo con ordine. Sotto il profilo strutturale, il capo relativo ai Crimini di guerra è composto da tre sezioni. La prima raccoglie l'ambito di applicazione e le definizioni. Innanzitutto l'*elemento comune di* contesto: le condotte costituiscono crimini di guerra se commesse nel corso di un conflitto armato internazionale o non internazionale e collegate a tale contesto. Nel *conflitto armato* rientrano anche i conflitti interni. Inoltre le disposizioni previste sono applicabili *alle missioni internazionali istituite nell'ambito di organizzazioni internazionali, o comunque in conformità al diritto internazionale, che prevedono l'utilizzo della forza armata da parte del personale impiegato*[10]. Delle definizioni fa parte l'individuazione delle *persone protette*. Quanto alle due sezioni successive, l'una è ordinata in ragione del bene giuridico tutelato (*Crimini contro le*

[8] Mi riferisco, ad esempio, al Progetto Conforti, frutto dei lavori della Commissione Conforti per l'attuazione dello Statuto istitutivo della Corte penale internazionale, istituita con d.l. 27 giugno 2002; o alla proposta Kessler, *Norme per l'adattamento dell'ordinamento interno allo Statuto della Corte penale internazionale*, del maggio 2002; ai progetti Iovene e Pianetta; al Progetto Cariplo, *International Crimes, Italian Law Making Policy, and Prospective Legislation*, presieduto da Fausto Pocar.

[9] Il riferimento è a parte del c.p.m.g. e alla legge 16 aprile 2009, n. 45, Ratifica ed esecuzione del II Protocollo relativo alla Convenzione dell'Aja del 1954 per la protezione dei beni culturali in caso di conflitto armato, fatto a L'Aja il 26 marzo 1999, nonché' norme di adeguamento dell'ordinamento interno.

[10] Così la *Relazione* all'articolato, p. 27.

persone protette), l'altra per modalità di aggressione (*Crimini relativi a mezzi e metodi di combattimento proibiti*).

Vorrei segnalare il complesso lavoro che è stato fatto per rendere questo capo uno strumento normativo agile, sia in assoluto, sia, e soprattutto, in comparazione con le definizioni statutarie di riferimento. Molto è dipeso anche dalla scelta di fornire una nozione unitaria di conflitto. Tale decisione ha comportato tutta una serie di ricadute molto importanti sulla redazione dell'articolato. Si è proceduto infatti a un'operazione difficile di accorpamento e di sintesi delle norme. La sequenza estremamente articolata proposta dallo Statuto, che prevede fatti simili integrare crimini diversi in relazione alla differente tipologia di conflitto, è stata drasticamente ridotta. Ne è risultato un testo snello che si compone di un numero adeguato di disposizioni, accortamente vagliate affinché i contenuti siano del tutto corrispondenti a quelli previsti dallo Statuto, anche se non nelle forme e nei termini in esso indicati. In alcuni casi, ipotesi riferite a crimini commessi in un conflitto armato internazionale sono stati estese a tutti i tipi di conflitto.

Questo lavoro di *wording* ha caratterizzato tutto l'operato della Sottocommissione Crimini di guerra. Nella descrizione delle fattispecie, sono state apportate altre tipologie di modifiche, discostandosi in alcuni casi non solo dalle disposizioni interne pregresse ma anche dalle previsioni statutarie, laddove strumenti internazionali, successivi allo Statuto, abbiano creato per l'Italia ulteriori obblighi di adeguamento[11]. Si segnalano in particolare le novità in tema di attacco ai beni culturali, volte a creare un sistema coerente con gli strumenti internazionali e con la legge interna di ratifica 45/2009 per la protezione dei beni culturali in caso di conflitto armato. Di rilievo anche l'introduzione di fattispecie non comprese nello Statuto ma previste da convenzioni internazionali di stretta attinenza[12]. A volte si è anticipato il futuro, privilegiando formulazioni che potranno rendere le disposizioni utilizzabili anche in un tempo a venire, essendo in grado di attrarre fatti realizzati, ad esempio, con tecnologie oggi sconosciute[13].

Un'altra scelta importante consiste nella decisione, di ordine generale, di evitare il problematico schema dei delitti aggravati dall'evento. Laddove ci si trovasse in presenza di un evento aggravante, è stato fatto ricorso alla scrittura di una fattispecie autonoma.

È stata poi necessaria una delicata opera di valutazione e comparazione per individuare le cornici edittali. La Sottocommissione Sanzioni ha confrontato il disvalore di ciascun crimine di guerra con quello espresso dagli altri crimini internazionali affinché non venissero a crearsi squilibri interni, essendo l'uniformità della risposta penale un parametro indispensabile. La dosimetria sanzionatoria ha costituito una scelta difficile: i limiti edittali sono stati calcolati in

[11] A titolo esemplificativo, la *Relazione*, p. 29, ricorda l'innalzamento, nel Codice, da 15 a 18 anni dell'età dei minori relativamente alla disposizione che ne sanziona il reclutamento, l'arruolamento e l'impiego nelle ostilità, laddove lo Statuto fissa il limite a 15 anni. Il discostamento è dovuto alla ratifica da parte dell'Italia del Protocollo opzionale alla Convenzione sui diritti del fanciullo che invece riconosce come tipica la condotta anche laddove sia stata realizzata nei confronti di infradiciottenni.

[12] Il riferimento è al crimine di "diffusione del terrore tra la popolazione civile". Assente nello Statuto, il divieto di compiere tali atti è previsto all'art. 33 della IV Convenzione di Ginevra del 12 agosto 1949 per la protezione delle vittime di guerra (Articolo 33. Nessuna persona protetta può essere punita per un'infrazione che non ha commesso personalmente. Le pene collettive, come pure qualsiasi misura d'intimazione o di terrorismo, sono vietate), all'articolo 51(2) del I Protocollo Aggiuntivo alle Convenzioni di Ginevra del 12 agosto 1949 relativo alla protezione delle vittime dei conflitti armati internazionali adottato a Ginevra l'8 giugno 1977 (Articolo 51. *Protezione della popolazione civile.* 2. Sia la popolazione civile che le persone civili non dovranno essere oggetto di attacchi. Sono vietati gli atti o minacce di violenza, il cui scopo principale sia di diffondere il terrore fra la popolazione civile) e all'art. 13(2) del II Protocollo aggiuntivo alle Convenzioni di Ginevra del 12 agosto 1949 relativo alla protezione delle vittime dei conflitti armati non internazionali adottato a Ginevra l'8 giugno 1977, ratificato dall'Italia con legge 11 dicembre 1985, n. 762 (Articolo 13. *Protezione della popolazione civile*. 2. Né la popolazione civile in quanto tale, né le persone civili dovranno essere oggetto di attacchi. Sono vietati gli atti o le minacce di violenza, il cui scopo principale sia di diffondere il terrore fra la popolazione civile).

[13] *Relazione*, p. 29.

relazione non solo alla gravità intrinseca dei fatti e a una prospettiva comparata, ma anche alle caratteristiche dell'ordinamento interno, non potendo evidentemente i crimini internazionali essere sanzionati meno gravemente rispetto a fatti in parte analoghi costituenti delitti ordinari.

Mi sembra che l'insieme dei crimini internazionali inseriti nel codice sia un innesto ben riuscito, ferme restando le scelte di coordinamento che saranno attuate dagli uffici competenti.

4. La giurisdizione

Uno dei punti più dibattuti ha riguardato la giurisdizione. Non per quanto riguarda l'individuazione della legge applicabile ai crimini internazionali, su cui si è chiuso rapidamente e all'unanimità per quanto la proposta si discosti leggermente dalle attuali soluzioni codicistiche. Secondo il Codice dei crimini, se il fatto è stato commesso in Italia da un cittadino o da uno straniero, si applicherà il principio di territorialità e si giudicherà secondo la legge italiana. Per i crimini internazionali commessi all'estero dal cittadino vale la stessa regola, per il principio di personalità. In base al principio di difesa sarà punito secondo la legge italiana anche lo straniero che abbia commesso all'estero un crimine internazionale ai danni dello Stato italiano o di un cittadino italiano. Laddove, ancorché in concorso con un cittadino italiano, lo straniero abbia commesso all'estero un crimine internazionale non ai danni dello Stato o di un cittadino italiano, la sua punibilità secondo la legge italiana sarà condizionata dalla presenza sul territorio.

Si potrebbe obiettare: dal momento che l'applicazione delle attuali regole del codice penale in materia darebbe luogo all'attivazione del principio di universalità, tanto più tale soluzione dovrebbe valere in presenza di un crimine internazionale e nessuna ipotesi dovrebbe sfuggire alla regola della procedibilità assoluta e incondizionata. Tuttavia, a ben guardare, la proposta della Commissione rafforza la tenuta e l'effettività dell'ordinamento e deroga al regime ordinario solo in un punto, richiedendo la presenza dello straniero sul territorio. Rinunciando a una scelta simbolica, viene privilegiato un reale funzionamento del sistema, non potendo il Pubblico Ministero perseguire *tout court*, e senza troppe prospettive di successo, il fatto commesso dallo straniero all'estero non contro lo Stato italiano o un suo cittadino e iniziare l'azione penale, come avrebbe altrimenti dovuto fare, anche *in absentia*, ai sensi dell'art. 112 Cost. Segnalo anche, salvo che per il crimine di aggressione, l'abolizione della condizione di procedibilità della richiesta del Ministro della Giustizia, prevista agli artt. 8, 9, 10 c.p. La scelta di Rocco è in fondo espressiva di un'interferenza problematica tra politica e giurisdizione, orientata peraltro sulle coordinate assiologiche del modello di Stato sotteso al codice del '30.

La totale concordanza su queste soluzioni si è invece sfaldata rispetto all'individuazione della giurisdizione interna competente. Qual è l'Autorità giudiziaria preposta a conoscere dei crimini internazionali? Il giudice ordinario? Il giudice militare? Entrambi? La portata dei crimini internazionali non richiederebbe, per il disvalore dei fatti e per la natura composita dei crimini, una valutazione unitaria del caso? Oppure dobbiamo differenziare in base allo *status* dell'autore?

La Commissione è ovviamente del tutto consapevole della portata dell'art. 103 della Costituzione, della progressiva giurisdizionalizzazione e della laicizzazione dell'ordinamento militare[14] che attualmente offre alla sua magistratura garanzie di autonomia e di indipendenza totalmente omologhe a quelle di ogni altra autorità giudiziaria nel nostro Paese – com'è testimoniato tra l'altro dalla presenza del Consiglio della magistratura militare[15]. Inoltre è stato ricordato il patrimonio di competenze specifiche, la rapidità dei tempi del processo e la particolare "capienza" dei Tribunali militari rispetto a un possibile afflusso di procedimenti per crimini

[14] V. anche la radicale riforma apportata con l. 7 maggio 1981, n. 180, nonché la l. 24 dicembre 2007 n. 244 e il d.lgs 15 marzo 2010, n. 66.

[15] Il CMM è stato istituito con l. 561/1988, se ne veda anche il successivo regolamento attuativo di cui al d.P.R. 24 marzo 1989, n. 158.

internazionali. Tuttavia credo che per parte della Commissione vi sia stata, in costante sottotesto, la preoccupazione che la comunità internazionale, e più specificamente la Corte, potessero mal interpretare una scelta volta ad attribuire in tutto o in parte la giurisdizione a quello che a livello internazionale può essere da alcuni percepito, nonostante ogni evidenza, come un "Tribunale speciale" nel senso deteriore del termine. Un pregiudizio, un *bias* probabilmente mediato dalla scarsa numerosità dei Tribunali militari e dagli stereotipi derivanti dalle caratteristiche di tali istanze in altri Paesi, come ad esempio negli Stati Uniti d'America, dove il procedimento è caratterizzato più dalla difesa degli interessi nazionali e delle Forze Armate (pensiamo solo al Cermis) che a una severa repressione dei fatti. Questa "percezione" del tutto infondata, almeno per quanto riguarda l'Italia, della giustizia militare potrebbe tuttavia condurre la Corte, composta molto eterogeneamente, a rivendicare il giudizio sulla base del principio di complementarietà. Il che costituirebbe sicuramente un *vulnus* per l'immagine del Paese.

La Sottocommissione Giurisdizione non ha comunque raggiunto una soluzione condivisa. Ha allora preferito formulare le tre soluzioni emerse nel corso delle sue riunioni, ciascuna espressa in articolati alternativi. In plenaria la Commissione non ha ritenuto di discutere nessuna delle tre proposte e ha valutato opportuno, trattandosi di una scelta politica, trasmettere al Ministro i tre testi corredati dalle rispettive relazioni di accompagnamento, assicurando così il supporto argomentativo e tecnico alla opzione che sarà ritenuta preferibile dal Legislatore. In sintesi le proposte sono:

1) *Attribuire la giurisdizione al giudice ordinario su tutti i crimini internazionali.* Le motivazioni: il legislatore, alla luce dell'art. 103.3, ha il potere discrezionale di ritenere un fatto reato ordinario o militare, come la stessa giurisprudenza costituzionale conferma. Dal momento che i crimini internazionali costituiscono fatti gravissimi, lesivi dei diritti fondamentali dell'individuo e dei valori fondanti la Comunità internazionale, il loro disvalore oggettivo è tale da prevalere sullo *status* dei soggetti coinvolti. Affidare la giurisdizione a un'unica autorità giudiziaria è rispetta l'ordinamento internazionale che considera i crimini internazionali in maniera unitaria e assicura l'attuazione di principi imprescindibili, come l'uniformità di trattamento. Il trasferimento dei crimini di guerra al Codice fuga tutti i dubbi di presunti trattamenti di favore e crea un *corpus* normativo coeso che ben si adatta a essere applicato da una sola magistratura: quella ordinaria.

2) *Conservare la giurisdizione militare per tutti i crimini internazionali previsti dal Codice se commessi da militari*. Le motivazioni: viene rispettata la "specialità" dello *status* di militare riconosciuta rilevante dall'art. 103 Cost. Dal momento che tale disposizione costituisce disciplina organica e permanente della materia, conservare la giurisdizione alla magistratura militare evita la ritenuta necessità di una modifica costituzionale. Impedisce inoltre il verificarsi di un'aporia e di una diseconomia di sistema, che si realizzerebbe laddove i reati più gravi che un militare possa commettere fossero sottratti alla giurisdizione *ad hoc* che l'ordinamento ha già istituito per occuparsene, esplicitamente legittimata dalla Costituzione. E se al giudice ordinario mancano le competenze specifiche e i mezzi per capire le dinamiche sottese ai fatti in giudizio e per garantire la speditezza del processo, il giudice militare gode sia di una formazione specifica sia dell'indipendenza e dell'autonomia proprie del giudice ordinario. La l. 237/2012, di ulteriore, parziale, adeguamento allo Statuto, conserva inoltre la ripartizione tra giurisdizione ordinaria e giurisdizione militare, a testimonianza della praticabilità della linea qui sostenuta.

3) *Attribuire al giudice ordinario la giurisdizione sui crimini internazionali e al giudice militare la giurisdizione sui crimini di guerra previsti al titolo II, capo 3 del Codice commessi da appartenenti alle Forze Armate italiane.* La motivazione: Adeguare la materia ai tradizionali criteri di giurisdizione e competenza vigenti nel sistema. Muoversi nella logica di valorizzare la formazione di ciascun giudice per interpretare al meglio i comportamenti dei giudicandi e le dinamiche dei fatti. Gli autori non appartenenti alle Forze Armate rispondono dinanzi alla Corte d'Assise, che ha composizione mista, con giudici popolari in grado di esprimere la sensibilità della Comunità di fronte a gravi reati di sangue; gli autori minorenni rispondono dinanzi al Tribunale dei

Minorenni, i cui membri possiedono una formazione specifica e dedicata; gli autori appartenenti alle Forze Armate italiane, se responsabili di crimini di guerra, rispondono conseguentemente dinanzi al Tribunale militare, in grado di apprezzare il particolare disvalore del fatto. La distribuzione di giurisdizione e competenza a magistrature egualmente indipendenti e imparziali, basata sulla combinazione tra specializzazione dei giudici, peculiarità soggettive dei giudicandi, specificità dei fatti commessi persegue una migliore efficienza della giustizia ed è testimonianza di una visione duttile e realistica del problema.

Per quanto riguarda le questioni inerenti alla connessione, come risulta dalla Relazione, e fermo restando che a decidere è la politica, le proposte della Commissione sono orientate a confermare le regole generali del codice di procedura penale.

Intorno a questi temi è in corso un acceso dibattito. Spero di essere riuscita a ricostruire con chiarezza e obiettività le ragioni di tutti. Per quanto mi riguarda mi auguro che la decisione relativa all'adozione dell'una o dell'altra soluzione avvenga nello stesso clima respirato in Commissione, e sia il frutto di una equilibrata ponderazione dei valori in gioco.

The Legality of Targeting Practices against War-Sustaining, Economic Objects

La legalità delle pratiche di *targeting* contro le risorse economiche di sostegno alla Guerra

Marisa Giustiniani

Summary: 1. Introduction. – 2. The Definition of Military Objective and the polarized Academic Debate. – 2.1. The Opposite to United States' Interpretation. – 2.2. The United States' Interpretation. – 3. Conclusion: What is the Legality of the Attacks in Question?

1. Introduction

On November 16, 2015 the United States destroyed 116 trucks trafficking illegal oil for the Islamic State in Syria and Iraq, hereinafter the Islamic State (IS). This is but one instance of attacks against occupied oil refineries, trafficking facilities and smuggling personnel in the context of the "war on terror" against IS. The United Nations Security Council (UNSC) identified oil as a main financing source for IS' war effort and estimated a revenue of about $1.65 million a day from illegal oil trafficking in 2015[1]. The intention was "to fight militants by going after them where it hurts - their cash[2]". The UNSC thus issued Resolution 2253 encouraging that IS financing be suppressed by taking action "consistent with (…) International Humanitarian Law[3]". In this context, attacks against IS revenue sources raised old questions on how to interpret the international law governing the legality of targeting objectives of economic character.

This paper deals with the rules of international humanitarian law (IHL) governing targeting practices against "War-Sustaining" Economic Objects based on the case study of attacks against oil refineries and trafficking facilities occupied by the Islamic State in Syria and Iraq. War-sustaining capabilities refer to "the economic infrastructure used to generate revenue for an enemy's armed forces[4]". The paper outlines the different legal positions that exist on this issue.

Before presenting this legal controversy, it is worth mentioning a fascinating interconnection between the legal issue at stake and the political economy of conflict and natural resources. Indeed, my interest in this topic started from my studies outside the domain of the law. I became fascinated by the feasibility mechanism, which states that access to natural resources prolongs conflict by allowing armed groups to sustain military efforts over longer periods of time[5]. So, political economic literature finds a causal link between armed groups' access to natural resources and their ability to sustain prolonged conflict. Testing this hypothesis on the case of IS substantiates the argument that their ability to extract revenue from occupied oil refineries in Syria enhanced IS' war-sustaining capacity and ultimately was a factor prolonging the duration of the conflict.

With this political economic theory in mind, I ask: to what extent should objects contributing to the war-sustaining capacity of the enemy fall under the definition of military objective? The debate on the legality of 'war-sustaining' attacks is structured along two opposite poles due to diverging interpretations of what constitutes a legitimate military objective. I will first present the scope of the legal controversy surrounding the legal definition of military objective. Then, I explain

[1] This article reflects a presentation given at the twenty-second congress of the International Society for Military Law and the Law of War (ISMLLW) held in Palazzo Vecchio, Florence, between May 10 and 14, 2022.
UN Security Council *Resolution 2253* (2015).

[2] J. NORTHAM, *U.N. Security Council Passes Resolution Targeting ISIS Revenue* (Feb.15, 2015) *NPR.*

[3] UN Security Council (n 1) 4.

[4] R. GOODMAN, *The Obama Administration and Targeting "war-sustaining" Objects in Non-international Armed Conflict*, (2016) 110 *AJIL* 663, 663.

[5] M. HUMPHREYS, *Natural Resources, Conflict, and Conflict Resolution: Uncovering the Mechanisms*, (2005) 49 *JCR* 508, 514.

the two main interpretative stances that exist on this issue, namely the United States' interpretation and the 'opposite to US interpretation'. Finally, I draw some conclusions on the legality of the attacks in question.

2. The Definition of Military Objective and the polarized Academic Debate

According to the fundamental principle of distinction attacks are only lawful when directed at legitimate military objectives, whereas civilian objects and persons cannot be targeted. The legal backbone to determine what is a military objective is found in article 52(2) of the first Additional Protocol to the Geneva Conventions (API), which is recognized as customary international law (CIL) applicable in international and non-international armed conflicts[6]. Article 52(2) of API states: *«Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offer a definite military advantage[7]»*.

Although this definition of military objectives seems prima facie straightforward, its wording is sufficiently ambiguous to give rise to different interpretations. A key interpretative difference concerns the meaning of effective contribution to military action. To what extent can the contribution be indirect? In other words, the main interpretative problem with regard to war-sustaining objects concerns level of proximity between the object being attacked and its connection to military action[8].

The notion of war-sustaining capabilities appears in the U.S.' internal law and policy. The US DoD *Law of War Manual* recognises three types of indirect contributions: *"war-fighting", "war supporting"* and *"war-sustaining capabilities[9]".* War-fighting capabilities regard "industries of fundamental importance for the conduct of the war," such as petroleum used to fuel military vehicles[10]. There is consensus that war-fighting objects are sufficiently proximate to military action to qualify as military objectives. Instead, the concept of war-sustaining capacity refers to "the economic infrastructure used to generate revenue for an enemy's armed forces[11]". These are objects "that indirectly support a party to the armed conflict's war effort such as by producing commodities that generate income the party may dedicate to war fighting or war supporting activities[12]". The discussion of whether such revenue-generating, war-sustaining objects effectively constitute legitimate military targets is polarised. Indeed, a main problem is the disagreement on economic targets which translates into two opposing interpretations of article 52(2).

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[6] J.M. HENCKAERTS and L. DOSWALD-BECK (eds.), ICRC *Customary International Humanitarian Law, Vol. I: Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary IHL Study), Rule 8.

[7] International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3.

[8] The requirement of effective contribution to military action applies cumulatively with the parameter of definitive military advantage, which must be understood on a tactical, operational level. The definition of military advantage has, albeit to a lesser extent, also been subject to interpretative disagreements, as some have suggested the – in my opinion overly expansive – position that a general, strategic military advantage suffices. *See* I. D. King 'The Legality of Attacking War-Sustaining Economic Objects' (2018) 54 *SIJL* 49, 63.

[9] US DoD Law of War Manual (updated December 2016), para 5.6.6.2.

[10] GOODMAN (n 4) 663.

[11] Ibidem, 664.

[12] Ibidem, 665.

2.1. The Opposite to United States' Interpretation

The most widespread opinion is that article 52(2) restricts the scope of military objectives, excluding war-sustaining objects from its definition. I call the view that attacks on war-sustaining objects violate API in letter and in spirit the 'Opposite to United States' Interpretation' since it is supported by the majority of States and is confirmed by ICRC's commentaries to the treaty.

As provided in article 31 of the Vienna Convention, turning to the object and purpose of the treaty can shed light on the correct interpretation of terms whose ordinary meaning is obscure or ambiguous[13]. Indeed, the principal commentary to API, written by members of the ICRC, contains statements relating to the treaty's object and purpose[14]. In line with the primary goal of IHL, the object and purpose of API is to minimise the suffering caused by armed conflict. War-sustaining attacks are deemed in violation of article 52(2) in light of their remoteness from *military action.* Interpreting the concept of *contribution to military action* as synonymous to military operation, implies that there has to be a very high proximity between the object and its military use, which war-sustaining objects do not satisfy. For the contribution to military action to be effective, it must be "concrete and discernible as opposed to merely hypothetical[15]".

2.2. The United States' Interpretation

The U.S.' interpretation of API is placed on the opposite side of the spectrum, providing a broader definition of military objectives, which supports attacks against war-sustaining objects. The first argument supporting this interpretation looks at the history of API. Although ICRC commentaries do not support the interpretation that war-sustaining objects fall under the definition of military objective, the Bothe Treatise considered "the leading treatise on API" accepts that war-sustaining capabilities fall under the definition of military objectives.[16] The Bothe Treatise makes specific reference to attacks on cotton crops during the American Civil War, endorsing it as an example of the legality of targeting war-sustaining objects. Indeed, the U.S. practice of targeting economic objectives must be understood in relation to its history, where the significant economic reliance of the Confederates on cotton crops to finance their arms and ammunition supply justified these attacks.

Secondly, from the U.S.' perspective, the attacks against war-sustaining objects reflect customary international law (CIL). In terms of *opinio juris*, when reviewing article 52(2) for the potential ratification of API, the U.S. held the belief that the "definition (of military objectives) was broad enough to meet (U.S) military requirements[17]". Moreover, the literature cites several examples of historical and contemporary practice in support of war-sustaining attacks. Attacks against IS fall amongst the variety of such examples. These attacks are referred to as "Operation Tidal Wave II" based on the "1943 attacks on oil refineries in Polesti, Romania[18]". Additionally, France, Russia and the UK - to name but a few - have supported the fight against IS executing attacks and/or expressly supporting the targeting of oil facilities to cripple IS' revenue flow. Furthermore, some have interpreted UNSC Resolution 2253 as condoning this perspective due to its encouragement to tackle IS revenue within the bounds of IHL. It has been argued that this indicates

[13] United Nations, Vienna Convention on the Law of Treaties, 1155 UNTS 1969, article 31.

[14] *See* Y. SANDOZ, Ch. SWINARSKI and B. ZIMMERMANN (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva (1987) para 2018.

[15] L. GISEL, *The Relevance of Revenue-Generating Objects in Relation to the Notion of Military Objective* (The Additional Protocols at 40: Achievements and Challenges, 18th Bruges Colloquium, Bruges, 2017) <https://www.coleurope.eu/sites/default/files/uploads/page/collegium_48_webversie.pdf>, 143.

[16] GOODMAN (n 4) 666.

[17] GOODMAN (n 4) 666.

[18] I. D. KING, *The Legality of Attacking War-Sustaining Economic Objects*, (2018) 54 *SIJL* 49, 72.

that all UNSC members "support the idea that economic sources can be legitimately eliminated through military means in order to bring the enemy's war-sustaining activities, and the conflict itself, to an end[19]". Essentially, the U.S.' definition understands the parameter of contribution to military action more broadly than the position of most States and of the ICRC Commentaries.

3. Conclusion: What is the Legality of the Attacks in Question?

It must be cautioned that unlike the U.S.' argument suggests, general state practice supporting war-sustaining attacks is very difficult to demonstrate, since many examples are criticised or controversial. In terms of state practice, even the United States lacks consistency. During the Iran-Iraq War of (1980-88) the US deemed that attacks against Iraq's oil infrastructure should be limited to oil products with immediate military use, rather than to oil as a source of revenue.[20] Furthermore, a well-known, controversial example is that of NATO attacks against revenues from the narcotics trade financing the Taliban insurgency in Afghanistan. NATO's policy instructions "to attack directly drug producers and facilities throughout Afghanistan" were highly criticised even internally and NATO quickly withdrew the guidance.[21] The policy generally established the link of narcotics revenues to the military effort, relieving attackers from having to demonstrate the belligerent nexus of specific drug traffickers and facilities.

Ryan Goodman has argued that the humanitarian concerns of war-sustaining targeting can be mitigated by applying "limiting principles[22]". There are some takeaways from the Afghanistan attacks that could substantiate the legality of the war-sustaining approach when it is subject to limiting principles. One main issue why NATO's attacks in Afghanistan were criticized is that the policy instructions generally established the link of narcotics revenues to the military effort, relieving attackers from the necessity of demonstrating the belligerent nexus of specific drug traffickers and facilities. Instead, a limiting principle can be that of proving the nexus between the war-sustaining target and the military effort on a specific, individual basis to avoid general and indiscriminate attacks. Moreover, a second major issue was that NATO grouped narcotics facilities and insurgents into the same targeting instructions. However, the conclusion that war-sustaining objects potentially constitute military objectives, does not automatically apply to civilian persons involved in war-sustaining activities. Indeed, these persons remain immune from attack and must be properly accounted for in the proportionality assessment unless or until they directly participate in hostilities[23]. Adopting limiting principles could help prevent that the connection between military action and the revenue becomes too remote, since the risk of this approach is that the one may construe nearly all civilian activities to sustain the war effort indirectly.

Perhaps, the most plausible and most recent explanation of the legality of war-sustaining attacks was offered in the 2020 Oslo Manual[24]. Rule 10 of the Manual states that: «In a non-international armed conflict, destruction or seizure is not prohibited when directed against items illegally appropriated or produced (such as oil or opium) by non-State armed groups and used by them to generate revenue for the purpose of continuing the hostilities[25]». In fact, under the domestic legal system of most States it is legal to seize or destroy items that non-State actors have appropriated or produced illegally. Importantly, taking this approach implies that the operation

[19] KING (n 18) 72.
[20] GISEL (n 15) 147 and GOODMAN (n 4) 675.
[21] M. N. SCHMITT, *Targeting Narcoinsurgents in Afghanistan: The Limits of International Humanitarian Law,* (2009) 12 *YIHL* 301, 301.
[22] GOODMAN (n 4) 667.
[23] *See* Additional Protocol I, Article 51(3) and Rule 6 of the ICRC Customary IHL Study
[24] Y. DINSTEIN and A.W. DAHL, *Oslo Manual on Select Topics of the Law of Armed Conflict* (Cham, Springer International Publishing AG, 2020).
[25] DINSTEIN (n 23) 96.

would be governed by domestic law and the law enforcement paradigm under international human rights law, rather than requiring the calculation of collateral damage under international humanitarian law.

Evoluzione delle Sanzioni internazionali dalla Società delle Nazioni alle Nazioni Unite[1]

Evolution of International Sanctions from the League of Nations to the United Nations

Umberto Leanza

Martedì 7 giugno è mancato il Professore Umberto Leanza, illustre docente di diritto internazionale. Nato nel 1933 a Napoli ove si è laureato in giurisprudenza con 110 e lode e dignità di stampa nel 1956 ed ha iniziato la sua carriera universitaria. Ottenuta la libera docenza nel 1963, è stato ordinario di Diritto della navigazione nella Facoltà di Giurisprudenza dell'Università di Messina e di Diritto internazionale alla Facoltà di Economia marittima dell'Istituto universitario navale, nonché Preside della Facoltà e Rettore dell'Istituto, quindi ordinario di Diritto internazionale nella Facoltà di Scienze Politiche dell'Università di Napoli e Preside della stessa Facoltà. Trasferitosi a Roma, dal 1976 al 1981 è stato professore stabile di Organizzazione internazionale e comunitaria nella Scuola superiore della pubblica amministrazione e poi ordinario di Diritto internazionale nella Facoltà di Giurisprudenza dell'Università di Roma Tor Vergata dal 1981 al 2008, nonché uno dei primi direttori del Dipartimento di Diritto pubblico dell'Ateneo. Medaglia d'oro e diploma di prima classe dei benemeriti della pubblica istruzione nel 1976. Professore visitatore in molteplici università estere e direttore di numerose ricerche scientifiche, all'impegno accademico e scientifico ha affiancato un'intensa attività nell'Amministrazione dello Stato. Capo del Servizio del contenzioso diplomatico e dei trattati del Ministero degli affari esteri ed agente del governo italiano innanzi alle giurisdizioni internazionali, europee e comunitarie, è stato capo della delegazione italiana in numerosi negoziati internazionali, tra cui la Conferenza diplomatica sull'istituzione della Corte Penale Internazionale.

Sommario: 1. Il diritto internazionale classico. – 2. La Società delle Nazioni. – 3. Il Patto Briand Kellog. – 4. Il conflitto italo etiopico. – 5. Le Nazioni Unite: il divieto dell'uso della forza. – 6. Il sistema di Sicurezza collettiva. – 7. Le misure di attuazione.

1. Il diritto internazionale classico

Fino al 1919, il diritto internazionale non poneva alcun limite all'uso della forza.

Il ricorso alla guerra ed alle misure coercitive diverse dalla guerra era considerato una manifestazione naturale della sovranità statale, uno strumento ordinario per la soluzione delle controversie internazionali. Così la violenza bellica poteva essere invocata dagli Stati sia a tutela dei propri diritti, sia per l'affermazione o la salvaguardia di interessi politicamente o economicamente convenienti.

L'assenza di un'Autorità superiore deputata ad accertare eventuali violazioni del diritto ed a dirimere le controversie, nonché lo *status* formalmente paritario degli Stati nell'ordinamento internazionale, spiegavano ampiamente il diritto degli Stati di ricorrere alla forza armata, considerata quale unico parametro in base al quale valutare i nuovi fatti sul piano giuridico.

Conseguenza diretta di ciò era l'assenza di ogni distinzione tra le sanzioni più o meno coercitive, ossia le azioni tese ad indurre all'osservanza del diritto, e l'uso della forza per la tutela o la realizzazione di semplici interessi nazionali.

Un ulteriore tratto caratteristico del diritto internazionale classico consisteva nell'accertamento unilaterale dell'illecito e nell'irrogazione unilaterale delle eventuali sanzioni. Tra il 600 ed il 900, essendo la Comunità internazionale priva di meccanismi sociali per fare osservare le

[1] Estratto dal volume *Evoluzione ed attualità delle sanzioni ONU dalla Società delle Nazioni alle odierne applicazioni per il mantenimento della pace*, raccolta degli interventi svolti in occasione del convegno tenutosi il 30 gennaio 2019, presso la Nuova Aula del Palazzo dei Gruppi parlamentari della Camera dei deputati.

norme di condotta, vigeva il sistema dell'autotutela, per cui ciascun consociato poteva stabilire unilateralmente se un altro Stato avesse o meno violato i suoi diritti e le modalità mediante le quali reagire alla pretesa violazione. Inoltre, gli illeciti internazionali restavano un fatto privato intercorrente tra lo Stato autore dell'illecito e la parte lesa. Nessun vincolo di solidarietà poteva dirsi esistente tra la parte offesa e gli Stati terzi, vincolo che potesse autorizzare questi ultimi ad intervenire per proteggere i diritti dell'offeso.

Pertanto, almeno fino alla prima guerra mondiale, la Comunità internazionale classica non elaborò regole finalizzate a bandire la guerra nei rapporti tra gli Stati: *ius ad bellum,* ma si limitò a disciplinare le sue modalità di esecuzione ed i comportamenti dei belligeranti, una volta che la violenza bellica avesse avuto inizio: *ius in bello*.

A questo sistema furono gradualmente introdotti dei correttivi, che divennero rilevanti nel periodo tra le due guerre mondiali. Ma già agli inizi del 900 cominciò ad emergere, al livello del diritto positivo, il problema della liceità del ricorso alla forza armata. Nel 1907, all'Aja, la Convenzione Drago-Porter sulla limitazione dell'uso della forza per il recupero dei crediti contrattuali, pose il divieto del ricorso alla forza armata a carico dello Stato creditore ove lo Stato debitore accettasse il ricorso a mezzi pacifici per la soluzione della controversia.

2. La Società delle Nazioni

Al termine della prima guerra mondiale, il Patto istitutivo della Società delle Nazioni, del 1919, costituì il primo tentativo di limitare il ricorso all'uso della forza nelle relazioni internazionali. In particolare, la Società delle Nazioni mirava ad imporre sul piano internazionale uno schema di sicurezza collettiva, finalizzato alla eliminazione della guerra di aggressione dalla categoria degli atti internazionali leciti ed il rispetto del principio della soluzione pacifica delle controversie internazionali.

Tuttavia, il Patto non poneva un obbligo assoluto di rinuncia alla guerra. Lo stesso Preambolo del Patto chiariva che la promozione della cooperazione internazionale ed il conseguimento della pace e della sicurezza andavano perseguite, tra l'altro, attraverso l'impegno di non ricorrere solo in determinati casi alle armi; oltre che con lo stabilimento di rapporti palesi, giusti ed onorevoli tra le Nazioni; il fermo riconoscimento delle regole del diritto internazionale come norme effettive di condotta tra i governi; l'osservanza della giustizia ed il rispetto scrupoloso di ogni Trattato nelle relazioni reciproche tra i popoli.

I criteri per la prevenzione della guerra erano fissati negli articoli, dall' 11 al 15 del Patto. Nell'art. 11, si dichiarava che ogni guerra o minaccia di guerra riguardante, direttamente od indirettamente, uno dei Membri della Società veniva considerato come materia interessante l'intera Società; e che questa avrebbe provveduto nei modi più opportuni ed efficaci per salvaguardare la pace tra le Nazioni.

Secondo l'art. 12, i Membri della Società delle Nazioni avevano l'obbligo di sottoporre ogni controversia, tale da condurre ad una rottura, ad un arbitrato, ad un regolamento giudiziale o all'esame del Consiglio della Società. Ma, la decisione arbitrale o giudiziale, così come il Rapporto del Consiglio, non producevano effetti determinanti, vincolando soltanto gli Stati a non ricorrere alle armi prima che fosse trascorso un periodo di tre mesi dalla Decisione o dal Rapporto, che dovevano essere adottati entro il termine massimo dei sei mesi dal giorno della sottoposizione della controversia.

Nei rimanenti articoli 13, 14 e 15, il Patto considerava, inoltre, lecite ed ammissibili, oltre che le ipotesi di legittima difesa, le guerre giustificate dalla difesa di un diritto che il diritto internazionale lasciava alla competenza esclusiva degli Stati, le guerre dirette contro uno Stato colpevole di una violazione del diritto internazionale, che si rifiutasse di eseguire una decisione arbitrale o giurisprudenziale o di conformarsi al Rapporto adottato all'unanimità dal Consiglio della Società, e le guerre intraprese qualora il Consiglio non fosse riuscito ad adottare tale Rapporto, o lo avesse

adottato a maggioranza e non all'unanimità. In tutti questi casi, i Membri della Società si riservavano il diritto di prendere quei provvedimenti che stimassero necessari per la tutela del diritto e della giustizia; cioè erano anche liberi di ricorrere alla guerra, solo se lo ritenevano opportuno.

I criteri per la repressione delle guerre ritenute illecite erano fissati dagli articoli 16 e 17.

Per il caso di guerra illecita, l'art. 16 determinava le misure concrete: economiche, sociali e, se del caso, militari, che potevano essere adottate a tutela dell'interesse generale alla pace. L'articolo fissava, anzitutto, il principio della solidarietà passiva: qualora uno dei Membri della Società ricorresse alla guerra, in violazione dei Patti di cui agli articoli 12,13 e 15, sarebbe stato *ipso facto* considerato colpevole di aver commesso un atto di guerra contro tutti gli altri Membri della Società, i quali si impegnavano, fin da allora, ad interrompere immediatamente ogni rapporto commerciale e finanziario con il Membro colpevole, e proibire ogni traffico tra i propri cittadini e i cittadini dello Stato contravventore, e a interdire ogni rapporto finanziario, commerciale o personale tra i cittadini di qualsiasi altro Stato, fosse o non fosse Membro della Società.

Oltre al boicottaggio obbligatorio dello Stato aggressore, l'art. 16 prevedeva anche l'adozione di eventuali misure militari. In tal caso, sarebbe stato dovere del Consiglio di raccomandare ai vari Stati interessati quali forze militari, navali ed aeree dovessero essere fornite da ciascuno dei Membri della Società, come contributo alle Forze armate destinate a proteggere i Patti sociali. Infine, l'articolo obbligava gli Stati membri a prestarsi mutua assistenza, onde attenuare le perdite derivanti a ciascuno di essi dalle sanzioni economiche, sociali e finanziarie; ed a prendere i necessari provvedimenti per facilitare il transito attraverso i rispettivi territori delle forze cooperanti alla protezione dei Patti sociali.

È però da sottolineare che, attraverso una serie di successive interpretazioni forzate ed arbitrarie dei suoi contenuti, operate dal Consiglio e dall'Assemblea, l'articolo fu svuotato, quanto alle sanzioni militari, di qualsiasi contenuto obbligatorio, ritenendosi che ciascuno Stato membro fosse libero di parteciparvi o meno, e subì anche un notevole affievolimento quanto alle sanzioni economiche, sociali e finanziarie. Con l'art. 17 del Patto, infine, le sanzioni dell'articolo 16 venivano estese anche agli Stati non membri. Ma su tale estensione esercitarono naturalmente i loro effetti anche le interpretazioni forzate ed arbitrarie che avevano in parte annullato ed affievolito l'art. 16.

In tal modo, malgrado l'originario dettato del Patto, la Società delle Nazioni non istituiva alcun meccanismo di attuazione coercitiva del diritto nei confronti di uno Stato membro che violasse le disposizioni del Patto stesso. Da un canto, l'Assemblea ed il Consiglio della Società potevano soltanto raccomandare misure sanzionatorie nei confronti degli Stati parte. Dall'altro, i Membri della Società avevano solo la facoltà, non già l'obbligo di reagire collettivamente alle violazioni di uno Stato parte.

Il Patto della Società delle Nazioni presentava, in tal modo, lacune grandiose che potevano fondamentalmente ricondursi alle seguenti. La guerra, ai termini del Patto, rimaneva lecita in una vasta sfera di casi, specie ove si tenga conto che le Decisioni unanimi del Consiglio non erano facili da conseguire. In ogni caso, l'applicazione delle sanzioni dell'art. 16 urtava contro l'inesistenza, ricavata attraverso una arbitraria interpretazione di un obbligo dei Membri della Società di prendere le armi contro il violatore dell'ordine. Il solo obbligo residuo dei Membri avendo natura economica. Ma, in ogni caso, anche tali più limitati doveri richiedevano, per la loro efficace attuazione, un concorso unanime dei Membri, difficile da conseguire. Infine, alcune tra le più grandi Potenze dell'epoca erano fuori della Società: perché non vi erano entrate o perché vi erano uscite.

Gli avvenimenti verificatisi negli anni, anche immediatamente successivi alla elaborazione del Patto, dimostrarono così la scarsa capacità operativa della Società delle Nazioni. Essa fu indebolita specialmente, dapprima dalla mancata adesione degli Stati Uniti, e successivamente dal recesso di alcuni Stati, come il Giappone, la Germania e l'Italia. La Società delle Nazioni si dimostrò incapace di applicare misure efficaci per arrestare, nel 1931, l'invasione giapponese della Manciuria e, nel 1935, l'aggressione dell'Italia all'Etiopia. Essa, infine, non resistette allo scoppio, nel 1939, della seconda guerra mondiale.

3. Il Patto Briand Kellog

Un altro tentativo, compiuto tra le due guerre mondiali, nell'intento di superare effettivamente la situazione di stallo creatasi con il Patto della Società delle Nazioni, venne operato con la conclusione del cosiddetto Patto Briand Kellog, di rinuncia alla guerra, firmato a Parigi, il 27 agosto 1928, con il quale le parti contraenti si impegnavano a rinunciare alla guerra come strumento di politica nazionale, pur senza qualificare la guerra di aggressione come crimine internazionale, e quindi senza prevedere alcuna sanzione per i casi di aggressione.

Nell'art. 1, il Patto conteneva soltanto, in termini più generali e radicali, la rinuncia alla guerra come strumento di politica internazionale, condannandone il ricorso come strumento per la soluzione delle controversie internazionali e come strumento di politica nazionale nei reciproci rapporti tra gli Stati parte.

E, nell'art. 2, proponeva espressamente agli Stati parte l'impegno a risolvere le controversie internazionali esclusivamente con mezzi pacifici.

Tuttavia, il Patto non predisponeva alcun organo o procedimento in grado di tradurre le affermazioni di principio in esso contenute in obblighi e sanzioni precisi. Inoltre, al pari del Patto della Società delle Nazioni, il Trattato del 1928, lungi dal bandire totalmente la guerra, lasciava ampie zone grigie, consentendo, ad esempio, i procedimenti di autotutela diversi dalla guerra, come le rappresaglie armate.

Il Patto raccolse un gran numero di ratifiche e di adesioni, anche se talora, come nei casi della Gran Bretagna e degli Stati Uniti, accompagnate da tali riserve così da svuotarne il già scarso contenuto. Dato che il Patto non prevedeva sanzioni e neppure poneva un vero e proprio obbligo di ricorso a procedure pacifiche, da un canto si cercò di completarlo con un Atto generale di Arbitrato obbligatorio, e dall'altro si cercò di metterlo in armonia con il Patto della Società delle Nazioni, dato che il Patto Briand Kellog aveva avuto l'adesione di un gran numero di Stati, e tra questi, di alcune grandi Potenze non firmatarie del Patto della Società delle Nazioni, in modo da impegnare queste ultime Potenze anche ai fini del Patto della Società. Ma, tali tentativi, pur condotti con grande tenacia, non sortirono alcun effetto concreto.

4. Il conflitto italo etiopico

Emblematico della incapacità della Società delle Nazioni di reagire alle crisi incombenti, resta il caso del conflitto italo etiopico. Dopo l'incidente di Ual Ual, negli ultimi mesi del 1935, da molte settimane il mondo attendeva la guerra. Vi era stata una riunione fallita della Commissione arbitrale italo etiopica, seguita da una Conferenza anglo franco italiana, a Parigi. Il 18 settembre, alla Società delle Nazioni, un Comitato speciale aveva cercato di evitare il conflitto, invitando l'Etiopia a preparare un piano di riforme da realizzare sotto la tutela di un gruppo di tecnici europei, tra cui gli italiani avrebbero avuto una posizione preminente. Ma il Governo italiano temette che la diplomazia avrebbe insabbiato con qualche modesta concessione le aspirazioni italiane e non volle modificare i suoi progetti, iniziando l'invasione. La macchina punitiva della Società delle Nazioni si mise allora in moto. Il 3 ottobre si riunì il Comitato dei tredici, incaricato di un primo rapporto sulle cause della guerra. Dopo averlo ricevuto e discusso, il Consiglio della Società costituì un Comitato ristretto, composto da sei membri: Francia, Gran Bretagna, Danimarca, Portogallo, Romania e Cile che accusò il Governo italiano di aver contravvenuto agli impegni assunti in base all'art. 12 del Patto della Società delle Nazioni. Definita Stato aggressore, l'Italia divenne passibile delle sanzioni economiche previste dall'art. 16 del Patto.

Il compito di definire le sanzioni fu affidato ad un Comitato di coordinamento che approvò il 18 novembre alcune clausole restrittive economico finanziarie, ed il giorno seguente tre provvedimenti: divieto alle importazioni dall'Italia, divieto di esportazione verso l'Italia; di materie prime e di alcuni prodotti chiave; misure di reciproco appoggio tra gli Stati sanzionisti. In Assemblea,

gli Stati favorevoli all'embargo delle armi furono cinquanta; quelli favorevoli alle misure di carattere finanziario cinquantuno; quelli favorevoli al boicottaggio dei prodotti italiani quarantanove; quelli favorevoli alle misure di reciproca assistenza tra gli Stati sanzionisti quarantuno. Non vi fu, quindi, l'unanimità. Austria, Ungheria ed Albania si astennero in tutte le votazioni.

Le sanzioni, peraltro, furono poco efficaci. Il Governo italiano se le aspettava e si era premunito immagazzinando le materie prime ed i prodotti industriali di cui avrebbe avuto bisogno durante il conflitto. Tre Stati importanti che non facevano parte della Società delle Nazioni: Stati Uniti, Germania e Giappone, garantirono all'Italia alcune forniture: soprattutto petrolio e carbone, che per altro in un primo tempo non erano state incluse nell'embargo, pur essendo particolarmente necessarie alla guerra. Altri Stati, come Spagna e Jugoslavia, pur avendo votato le sanzioni, lasciarono intendere al Governo italiano che non avrebbero applicato le sanzioni con particolare rigore. Un'altra reazione alle sanzioni da parte dell'Italia fu di pianificare e mettere in atto una strategia economica fondata sull'autarchia. L'Italia tentò di realizzare un'economia indipendente rispetto alle importazioni dall'estero, in modo da diventare completamente autonoma economicamente e di rendere, quindi, inutili ed inefficaci le sanzioni economiche di qualsiasi genere.

Ma gli esperti inglesi continuavano a studiare le importazioni italiane di petrolio, in vista di un inasprimento delle sanzioni. Alle voci di un aggravio delle sanzioni, esplosero le minacce italiane di un possibile conflitto più esteso nel caso dell'applicazione delle sanzioni petrolifere.

Il Generale Ezio Garibaldi si recò a Londra, sostenendo di parlare a nome del Governo italiano ed avvertendo che, sebbene il Governo volesse una soluzione onorevole della crisi, basata su reciproche concessioni, non avrebbe, però, esitato a scatenare una guerra più vasta per il petrolio. I canali diplomatici rimasero comunque aperti soprattutto con la Francia e la Gran Bretagna, al fine di poter raggiungere un eventuale compromesso.

Si arrivò così al cosiddetto Patto Hoare Laval che nelle intenzioni dei proponenti avrebbe dovuto fermare il conflitto in atto. Si proponeva, in sostanza, di consentire all'Italia degli ampliamenti territoriali nel Trigrai orientale ed alcune rettifiche di confine in Dankalia ed in Ogaden. Per contro, l'Italia avrebbe ceduto la città di Assab e la stretta fascia di territorio che la comprendeva, concedendo all'Etiopia l'accesso al mare.

Il documento fu consegnato al Governo italiano l'11 dicembre 1935, il quale si impegnò a discuterlo nel Gran Consiglio del Fascismo il 18 dicembre. Ma lo stesso giorno il Ministro degli Esteri britannico Samuel Hoare si dimise, ed al suo posto si insediò Antony Eden, contrario al compromesso. Nella stessa giornata, a Parigi, il Negus espresse il suo rifiuto al Piano. Dopo tali avvenimenti, il Governo italiano lasciò cadere la proposta franco-britannica ed il Piano non fu nemmeno esaminato. Ciò nonostante, buona parte della società inglese non condivideva le sanzioni e la stessa Gran Bretagna le applicò con un certo distacco, escludendo dalle sanzioni i noli navali e le assicurazioni, che costituivano i principali settori del commercio tra l'economia britannica e quella italiana.

I provvedimenti sanzionatori avrebbero potuto produrre effetti negativi se la campagna etiopica si fosse protratta almeno per due inverni. Ma la guerra terminò già nel maggio del 1936. Le sanzioni rimasero così in vigore dal 18 novembre 1935 al 4 luglio 1936. Le loro conseguenze furono esattamente opposte a quelle che la Società delle Nazioni aveva preconizzato di conseguire. Le sanzioni suscitarono in Italia un'ondata di indignazione che rafforzò il consenso del regime ed irrigidì le posizioni del Governo italiano, che dopo la data di inizio delle sanzioni, malgrado le apparenze, non ebbe alternative al rifiuto di qualsiasi compromesso.

Dopo l'ingresso delle truppe italiane ad Addis Abeba, il 5 maggio 1936, numerosi Stati cominciarono ad esercitare pressioni perché le sanzioni fossero revocate. In particolare, gli Stati Sud americani, che avevano importanti rapporti commerciali con l'Italia, come il Cile, l'Argentina, l'Uruguay ed il Guatemala, non essendo interessati a seguire gli Stati europei sulla strada della fermezza. Il 30 giugno, su pressione dell'Argentina, fu convocata un'Assemblea Speciale della Società delle Nazioni, nel corso della quale il Negus propose di non riconoscere le conquiste italiane

in Etiopia; ma la sua proposta fu respinta con ventitré voti contrari, uno favorevole e venticinque astenuti. Il 4 luglio 1936, nel corso della stessa Assemblea, dopo poco più di sette mesi dalla loro promulgazione, la Società delle Nazioni revocò le sanzioni, il cui fallimento si rivelo un colpo mortale alla credibilità della stessa Società. Il caso del conflitto italo etiopico dimostrò chiaramente che le sanzioni, anche per le modalità con cui erano state concepite ed attuate, costituivano un'arma a doppio taglio, di cui era difficile prevedere gli effetti.

5. Le Nazioni Unite: il divieto dell'uso della forza

Dopo il 1945, la situazione internazionale muta radicalmente. Il mantenimento della pace diviene il fine supremo della Comunità internazionale.

L'art. 1 dello Statuto delle Nazioni Unite, l'Organizzazione che sostituisce la società delle Nazioni, annovera tra i suoi scopi quello primario del mantenimento della pace e della sicurezza internazionale. Concorrono al raggiungimento di questo scopo due disposizioni fondamentali della Carta dell'ONU. Secondo l'art. 2, paragrafo 3, dello Statuto, gli Stati membri delle Nazioni Unite hanno, in primo luogo, l'obbligo di risolvere le loro controversie internazionali esclusivamente con mezzi pacifici, in modo che la pace e la sicurezza internazionali e la giustizia non siano messe in pericolo. In base all'art. 2, paragrafo 4, dello Statuto si pone, in secondo luogo, un divieto assoluto ed incondizionato, sia alla minaccia che all'uso della forza armata nelle relazioni internazionali.

L'espressione impiegata: forza armata, mostra che, a differenza dei Patti del 1919 e del 1928, la Carta dell'ONU bandisce tutte le azioni militari, ossia anche quelle non suscettibili di essere tecnicamente definite come azioni di guerra. L'art. 2, paragrafo 4 della Carta dell'ONU costituisce il pilastro fondamentale dell'attuale disciplina dell'uso della forza armata nel diritto internazionale. Ai sensi di questa disposizione, i Membri delle Nazioni Unite si devono astenere, nelle loro relazioni internazionali, dalla minaccia dell'uso della forza, sia contro l'integrità territoriale o l'indipendenza politica di qualsiasi Stato, sia in qualunque maniera incompatibile con i fini delle Nazioni Unite.

Numerose risoluzioni adottate dall'Assemblea Generale e svariati elementi ricavabili dalla prassi internazionale depongono poi nel senso della formazione, a partire dalla disposizione esaminata, di una norma di natura consuetudinaria, per di più cogente, sul divieto dell'uso e della minaccia dell'uso della forza nelle relazioni internazionali. Ciò è stato anche affermato dalla Corte internazionale di giustizia nella sentenza del 27 giugno 1986 sulle attività militari e paramilitari in e contro il Nicaragua, controversia tra Stati Uniti e Nicaragua. La norma convenzionale dello Statuto e quella consuetudinaria, ha precisato la Corte, sono tra loro indipendenti ed il contenuto dell'una non deve necessariamente essere attribuito anche all'altra. Il contenuto della norma consuetudinaria può modificarsi ed evolversi nel tempo, mentre la disposizione dello Statuto mantiene sempre il suo significato iniziale.

La principale eccezione al divieto dell'uso e della minaccia della forza armata è costituita dal diritto naturale alla legittima difesa, individuale e collettiva, nel caso che abbia luogo un attacco armato contro un membro delle Nazioni Unite.

Il divieto di uso e minaccia della forza armata incontra, poi, il limite dell'attribuzione al Consiglio di Sicurezza del monopolio dell'uso della forza per il mantenimento della pace e della sicurezza internazionale, da esercitare secondo le modalità di cui al capo VII della Carta dell'ONU. In questo settore delle relazioni internazionali, la Carta dell'ONU poggia sull'idea che l'utilizzo della forza debba essere accertato nel Consiglio di Sicurezza, cui la Carta affida, ai sensi dell'art. 24, la responsabilità principale in ordine al mantenimento della pace e della sicurezza internazionale.

Pertanto, gli Stati conservano il diritto di usare la forza armata nella sola ipotesi residuale costituita dall'autodifesa. Trattatasi di un principio previsto dall'art. 51 della Carta, ed appartenente al diritto internazionale consuetudinario, come riconosciuto dallo stesso art. 51, che fa riferimento al diritto naturale: *inherent right o droit naturel* di autotutela, quale diritto preesistente alla Carta

medesima, e come affermato anche dalla Corte internazionale di giustizia nella sentenza della controversia tra Nicaragua e Stati Uniti.

Si è discusso circa il rapporto tra norma consuetudinaria, dotata di forza cogente, sulla legittima difesa e norma convenzionale dello Statuto, soprattutto al fine di dare sostegno alle ipotesi di ricorso alla forza armata per la protezione dei propri connazionali all'estero o per la legittima difesa preventiva, che difficilmente possono trovare fondamento nel disposto dell'art. 51 della Carta. Ma, la stessa Corte internazionale di giustizia, nella sentenza relativa alla controversia tra Nicaragua e USA, ha riconosciuto che il diritto alla legittima difesa è sancito sia dal diritto consuetudinario, sia dalla Carta dell'ONU, e che l'art. 51 non sussume né è condizionato dalla regola consuetudinaria. Le due norme perciò coesistono e non sono del tutto coincidenti. Ciò vale, ad esempio, per l'obbligo procedurale di portare immediatamente a conoscenza del Consiglio di Sicurezza le misure adottate dagli Stati membri in autotutela, di cui all'art. 51 della Carta dell'ONU, e quello altrettanto procedurale dello Stato leso che deve cessare le azioni intraprese in legittima difesa appena il Consiglio abbia adottato le misure per ripristinare la pace e la sicurezza internazionale.

6. Il sistema di Sicurezza collettiva

Lo Statuto dell'ONU se da un lato, con l'art. 2, paragrafo 4, sancisce il divieto dell'uso della forza nei rapporti internazionali, fatta salva l'ipotesi dell'art. 51, che prevede la legittima difesa individuale e collettiva, dall'altro, con il capo VII, accentra nel Consiglio di Sicurezza la competenza a compiere le azioni necessarie per il mantenimento della pace tra gli Stati. Pertanto, il Sistema di sicurezza collettiva delle Nazioni Unite si fonda sul monopolio della forza da parte del Consiglio che, ai sensi dell'art. 24, ha responsabilità primaria nel mantenimento della pace.

Facendo leva sul riferimento alla responsabilità, primaria e non esclusiva, del Consiglio di Sicurezza nel mantenimento della pace, la risoluzione 377 del 1950, *Uniting for Peace* dell'Assemblea Generale, detta anche risoluzione Acheson, Segretario di Stato americano che l'aveva ideata durante la crisi coreana, stabilì che in caso di minaccia alla pace, se il Consiglio non possa assolvere il suo ruolo primario per mancanza di unanimità dei suoi membri permanenti, l'Assemblea Generale può esaminare la questione, al fine di raccomandare agli Stati membri misure collettive da adottare, compreso se del caso, l'impiego della forza armata. Malgrado il parere favorevole, espresso dalla Corte internazionale di giustizia, il 20 luglio 1962, nella questione relativa a certe spese delle Nazioni Unite, va sottolineato che l'azione dell'Assemblea Generale si pone in contrasto con l'art. 11, paragrafo 2, dello Statuto dell'ONU, ai sensi del quale, sebbene l'Assemblea Generale abbia una competenza generale a discutere ogni questione relativa al mantenimento della pace, la sua competenza incontra un limite nei casi in cui sia necessaria un'azione, perché in tali casi essa è chiamata a deferire la questione al Consiglio di Sicurezza.

Nelle previsioni della Carta, la gestione della sicurezza collettiva si articola in diverse competenze del Consiglio di Sicurezza, indicate dal capo VII. Secondo l'art. 39, esso ha, innanzitutto, il potere di esercitare se, nel caso concreto, sussista una minaccia, una violazione della pace o un atto di aggressione. In seguito a tale accertamento, il Consiglio di Sicurezza può decidere: secondo l'art. 40, l'adozione di misure provvisorie, come il cessate il fuoco, secondo; l'art. 41, l'adozione di misure implicanti l'uso della forza armata; e secondo l'art. 42, l'adozione di misure non implicati l'uso della forza. La cronologia indicata nel Capo VII è puramente indicativa, non essendo il Consiglio obbligato ad esperire le misure nell'ordine indicato.

Ma, va dato atto di due limiti al funzionamento del Sistema di sicurezza collettiva: l'uno procedurale, l'altro strutturale. Il limite procedurale al funzionamento del sistema consiste nella circostanza che esso presuppone l'accordo unanime dei vincitori della seconda guerra mondiale, secondo la formula di Yalta: Cina, Francia, Gran Bretagna, Russia e Stati Uniti. Essi sono beneficiari di un doppio privilegio: secondo l'art. 23, sono membri permanenti del Consiglio di Sicurezza; e

secondo l'art. 27, nelle questioni non procedurali dispongono del diritto di veto. Il limite strutturale del Sistema di sicurezza collettiva risiede, invece, nella circostanza che le Nazioni Unite non dispongano di una propria forza armata, dato che non hanno mai trovato attuazione gli articoli 43 e seguenti della Carta. A norma di essi, si sarebbe dovuto costituire un meccanismo armato accentrato, basato sull'impiego di contingenti militari nazionali, sotto il comando del Consiglio di Sicurezza, coadiuvato dal Comitato di Stato Maggiore dei membri permanenti del Consiglio. Esso avrebbe dovuto rendere il ricorso all'uso della forza armata essenzialmente indipendente, sia dagli Stati fornitori dei contingenti, che dagli Stati nei confronti dei quali si fossero svolte le operazioni.

Durante la guerra fredda, i limiti del Sistema di Sicurezza collettiva contenuti *ab initio* nella Carta: il diritto di veto; e quelli creatisi successivamente nella fase attuativa dello Statuto: l'inoperatività del meccanismo armato accentrato; hanno sostanzialmente impedito il funzionamento del Sistema stesso. Ma, già nei primi anni del post guerra fredda, si è avuto un potente rilancio delle Nazioni Unite nella gestione delle crisi internazionali, al punto di poter parlare di un surriscaldamento del Sistema di Sicurezza collettiva.

L'attivismo del Consiglio di Sicurezza è stato dovuto, innanzitutto, alla capacità di iniziativa e di influenza degli Stati Uniti, ma anche alla necessità per la Comunità internazionale di fronteggiare nuove minacce alla sicurezza internazionale, determinatesi a partire dagli anni novanta del secolo scorso, tra cui: terrorismo, traffico di stupefacenti, riciclaggio, tensioni sociali, etniche e religiose, focolai di instabilità regionale e mancata partecipazione ai processi di sviluppo. Questo attivismo ha portato, però, a partire dagli stessi anni, allo sviluppo di deroghe al divieto generale di uso e minaccia della forza, previsto dall'art. 2, paragrafo 4: alle operazioni militari di mantenimento della pace, condotte caso per caso dal Consiglio di Sicurezza, ai sensi del Capo VII, si sono affiancate le operazioni militari autorizzate dallo stesso Consiglio, entrambe in deroga alle previsioni statutarie.

7. Le misure di attuazione

Ai sensi dell'art. 39 dello Statuto, il Consiglio di Sicurezza accerta l'esistenza di una minaccia alla pace, di una violazione della pace o di un atto di aggressione. Il Consiglio dispone di un ampio potere discrezionale, specie in relazione al concetto di minaccia alla pace, maggiormente elastico ed idoneo a ricomprendere varie situazioni non necessariamente caratterizzate dal ricorso alla violenza bellica, che possiede uno specifico carattere preventivo, in quanto concepito al fine di evitare che taluni rischi producano effetti distruttivi sulla pace e la sicurezza internazionale. Per questo, la maggior parte degli interventi del Consiglio di Sicurezza, nel post guerra fredda, sono stati basati proprio sul presupposto della minaccia alla pace.

Possono costituire una minaccia alla pace: situazioni di crisi o di tensione tra due o più Stati, situazioni puramente interne ad uno Stato che turbano la pace e la sicurezza internazionale o guerre civili. La nozione ha subito un'inedita dilatazione, finendo per riguardare ogni violazione di un obbligo essenziale per la salvaguardia degli interessi fondamentali della Comunità internazionale. Tra esse possono annoverarsi: le gravi violazioni dei diritti dell'uomo, le violazioni della democrazia in uno Stato, il terrorismo internazionale e la proliferazione nucleare.

Al contrario, le nozioni di violazione della pace e di atto di aggressione appaiono meno ampie, essendo entrambe contrassegnate dall'impiego della violenza bellica nelle relazioni interstatali. Esse sono limitate essenzialmente alle ipotesi di attacco armato o di invasione di un territorio da parte di un altro Stato. Il Consiglio di Sicurezza è ricorso poche volte al concetto di violazione della pace; e mai ha dichiarato l'esistenza di un'aggressione; anche se talora ha considerato gli atti di aggressione come minacce o violazioni della pace. A fronte di una minaccia alla pace, di una violazione della pace o di un atto di aggressione, il Consiglio può, anzitutto, formulare raccomandazioni ex art. 39, indicando agli Stati interessati procedure e termini di regolamento.

Ai sensi dell'art. 40 dello Statuto, il Consiglio di Sicurezza può invitare le parti interessate ad ottemperare a quelle misure provvisorie che esso consideri necessarie o desiderabili. Costituiscono tipiche misure provvisorie: la richiesta di immediata cessazione delle ostilità, cosiddetto cessate il fuoco, avanzata dal Consiglio, in occasione di guerre internazionali o civili, ed il ritiro delle forze armate dal territorio occupato. Le misure di cui all'art. 40 sono concepite come misure di urgenza, avendo esclusiva finalità cautelare. Esse sono dirette unicamente a prevenire l'aggravarsi della situazione e non devono pregiudicare la soluzione definitiva della controversia; cioè a dire, i diritti, le pretese e le posizioni delle parti interessate. Queste misure non hanno efficacia vincolante: il Consiglio può solo invitare le parti interessate ad ottemperare ad esse. Ma, in ogni caso, la mancata esecuzione delle misure raccomandate è tenuta in debito conto dal Consiglio, ai fini dell'eventuale adozione delle misure coercitive ex articoli 41 e 42.

L'art. 41 contempla le misure non implicanti l'uso della forza armata, comminate dal Consiglio di Sicurezza contro Stati o fazioni in lotta all'interno di uno Stato, che turbino o minaccino la pace o la sicurezza internazionale. Queste misure, che devono essere attuate da tutti gli Stati membri, non hanno una portata propriamente punitiva; pur costituendo delle sanzioni, sono degli strumenti per spingere lo Stato, il cui comportamento è tale da mettere a rischio la pace e la sicurezza internazionale, ad interrompere tale comportamento, conformandosi alla decisione del Consiglio di Sicurezza che lo riguarda. Rientrano in tali sanzioni: l'interruzione totale o parziale delle relazioni economiche e delle comunicazioni ferroviarie, marittime, aeree, postali, telegrafiche, radio ed altre, e la rottura delle relazioni diplomatiche. La lista delle sanzioni indicate è solo esemplificativa. Il Consiglio, ad esempio, ha fatto più volte ricorso all'art. 41, per chiedere agli Stati membri di non riconoscere alcun effetto giuridico alle situazioni create in violazione della Carta ed agli atti compiuti nei territori occupati a seguito di queste violazioni.

In merito al blocco delle relazioni economiche, se in alcuni casi l'embargo ha avuto ad oggetto il solo obbligo per gli Stati membri di non vendere armi, materiale bellico ed equipaggiamenti militari; in altri casi il Consiglio ha imposto un embargo totale, che ha riguardato, ad esempio, tutte le materie prime ed i prodotti provenienti dallo Stato investito dalle misure. Durante la guerra fredda, il Consiglio di Sicurezza ha fatto un limitato ricorso alle misure non implicanti l'uso della forza: l'embargo economico totale nei confronti della Rodesia del Sud, nel 1966, con la risoluzione 232; e l'embargo di armi nei confronti del Sud Africa, nel 1977, con la risoluzione 418. A partire dagli anni novanta, il ricorso a tali misure è progressivamente aumentato: l'embargo nei confronti dell'Iraq, dopo l'aggressione al Kuwait, con la risoluzione 661 del 1990; quello contro la Serbia Montenegro, con la risoluzione 757 del 1992; e quello contro la Corea del Nord, con riferimento al suo programma di riarmo nucleare, del 2006.

Poiché spesso l'interruzione di relazioni economiche, soprattutto se totale o quasi, produce gravi effetti nei confronti della popolazione civile, il Consiglio di Sicurezza ha cercato di evitare queste conseguenze, ricorrendo alle cosiddette sanzioni intelligenti: le *smart* o *targeted sanctions*; ossia a misure restrittive che sono rivolte contro singole persone, imprese od organizzazioni, oppure limitano il commercio di determinati prodotti chiave. Si può trattare di sanzioni finanziarie: congelamento di fondi ed altri beni patrimoniali, divieto di transazioni, restrizioni agli investimenti, ai viaggi, di natura diplomatica, culturale o sportiva o del traffico aereo.

Il Consiglio di Sicurezza ha fatto ampiamente ricorso alle sanzioni intelligenti nel contrasto al terrorismo internazionale, stabilendo il congelamento dei beni o limitando gli spostamenti o vietando la vendita di armi e materiale collegato, nei confronti di Osama Bin Laden, dei talebani e di persone fisiche, gruppi od organizzazioni collegate, indicate in liste di presunti terroristi, con la risoluzione 1373 del 2001.

Sanzioni intelligenti, consistenti nel congelamento dei beni e nel divieto di forniture di materiali, che possono servire per il riarmo nucleare iraniano, sono state anche adottate nei confronti di persone fisiche e giuridiche, con la risoluzione 1737 del 2006. Infine, anche le risoluzioni 1970 e 1973 del 2011, adottate per interrompere le violazioni massicce e generalizzate dei diritti

umani, poste in essere dal regime di Gheddafi, hanno previsto, tra l'altro, limitazioni ai viaggi e congelamento dei beni, nei confronti del Colonnello libico, dei suoi familiari e di altri soggetti del suo *entourage*, e di alcuni enti economici libici sotto il loro controllo.

Le sanzioni intelligenti si sono tuttavia rivelate problematiche sul fronte della tutela dei diritti umani, con riferimento a coloro che vengono iscritti nelle liste dei destinatari delle misure.

Le misure non implicanti l'uso della forza possono formare oggetto sia di una raccomandazione, sia di una decisione del Consiglio di Sicurezza, che vincola i membri delle Nazioni Unite. Ai sensi dell'art. 25 della Carta, infatti, gli Stati parte dell'ONU si obbligano ad accettare ed eseguire le decisioni del Consiglio.

Infine, l'art. 42 della Carta concerne le ipotesi in cui il Consiglio di Sicurezza decide di impiegare la forza nei confronti di uno Stato responsabile di aggressione o di violazione o di minaccia alla pace; ed anche all'interno di uno Stato, nel caso in cui la situazione entro i confini dello Stato assuma proporzioni di gravità tali, da costituire una minaccia alla pace.

In particolare, il Consiglio può intraprendere, con forze aeree, navali o terrestri dei membri ogni azione che sia necessaria a mantenere o ristabilire la pace e la sicurezza internazionale. Tale azione può comprendere: dimostrazioni, blocchi, ed altre operazioni, poste in essere da forze dipendenti direttamente dal Consiglio.

Ma, considerato che il Consiglio non dispone di mezzi propri per condurre le attività di polizia internazionale ed interna, esso è intervenuto creando, caso per caso, Forze di pace, incaricate, con compiti assai limitati, di operare: *peacekeeping operations;* o autorizzando gli Stati, singolarmente o collettivamente considerati, ad intervenire con l'uso della forza: *peace enforcing operations.* Trattasi in entrambi i casi di soluzioni che non trovano immediato fondamento nel dettato testuale della Carta, la cui base giuridica resta dibattuta, anche al fine del loro inquadramento nella categoria delle vere e proprie sanzioni previste dallo Statuto.

Allo stesso tempo, il nuovo concetto di sicurezza internazionale ha richiesto alle Nazioni Unite uno sforzo di adattamento per far fronte alle nuove sfide e l'assunzione di compiti più ampi e differenziati, rispetto a quanto previsto dai redattori della Carta. Di conseguenza, l'Organizzazione è stata in un certo senso costretta a rivedere le proprie modalità di intervento nelle nuove crisi internazionali, oltre che con le operazioni di mantenimento della pace e con la delega agli Stati dell'uso della forza, mediante i nuovi istituti dell'intervento umanitario e della responsabilità di proteggere, che riguardano prevalentemente la tutela della popolazione civile, e difficilmente possono quindi rientrare nel concetto di sanzioni.

Riferimenti bibliografici

Riflessioni sui regimi sanzionatori tra diplomazia e diritto internazionale a proposito del volume: Evoluzione ed attualità delle sanzioni ONU dalla Società delle Nazioni alle odierne applicazioni per il mantenimento della pace[1]

Gianfranco Gabriele Nucera

1. Premessa

La pubblicazione del volume Evoluzione ed attualità delle sanzioni ONU. Dalla Società delle Nazioni alle odierne applicazioni per il mantenimento della pace fornisce l'occasione per una riflessione sul significato giuridico e politico delle sanzioni, a partire dal loro utilizzo nel periodo tra le due guerre mondiali, per arrivare alle odierne sanzioni collettive adottate nell'ambito delle Nazioni Unite. Con il termine "sanzioni" ci si riferisce, nel linguaggio giuridico internazionale, a tutte quelle misure adottate da uno o più Stati, o nel contesto di organizzazioni internazionali, per far cessare talune condotte qualificate come illecite o comunque contrarie ad interessi di natura pubblicistica.

All'interno di questo *catch-all term* esistono differenze sostanziali tra le possibili tipologie di misure da adottare. Tra queste, grande rilevanza presentano le misure coercitive non implicanti l'uso della forza armata, adottate dal Consiglio di sicurezza delle Nazioni Unite (ONU), nell'ambito dei suoi poteri previsti dal Cap. VII della Carta, in seguito all'accertamento dell'esistenza di una minaccia alla pace, di una violazione della pace o di un atto di aggressione. Ai sensi dell'art. 41 della Carta, il Consiglio può decidere quali misure, non implicanti l'impiego della forza armata, debbano essere adottate per dare effetto alle sue decisioni, e può invitare i membri delle Nazioni Unite ad applicare tali misure. A titolo esemplificativo, il testo indica che queste possono comprendere un'interruzione totale o parziale delle relazioni economiche e delle comunicazioni ferroviarie, marittime, aeree, postali, telegrafiche, radio ed altre, e la rottura delle relazioni diplomatiche.

La Carta dell'ONU non è il primo trattato istitutivo di organizzazioni internazionali che fa riferimento all'uso di misure coercitive. Già nel primo dopoguerra, l'art. 16 del Patto della Società delle Nazioni (SdN) disponeva che qualora uno dei Membri della Società avesse fatto ricorso alla guerra sarebbe stato considerato ipso facto come colpevole di aver commesso un atto di guerra contro tutti gli altri Membri della Società, i quali si impegnavano a interrompere immediatamente ogni rapporto commerciale e finanziario col medesimo, a proibire ogni traffico fra i propri cittadini e i cittadini dello Stato contravventore, e ad interdire ogni rapporto finanziario, commerciale o personale fra i cittadini dello Stato contravventore e i cittadini di qualsiasi altro Stato, Membro o meno della Società. In aggiunta al vigente sistema ONU, sanzioni possono essere adottate anche nel contesto di altre organizzazioni internazionali. Nell'ambito dell'Unione europea (UE), le misure restrittive rappresentano uno strumento, utilizzato nell'ambito della politica estera e di sicurezza comune (PESC), per tutelare i valori e la sicurezza dell'Unione, preservare la pace, consolidare e sostenere la democrazia, lo stato di diritto e i diritti umani.

2. Il sistema sanzionatorio nell'ambito della Società delle Nazioni

A partire dal sistema previsto dal Patto della SdN, il meccanismo delle sanzioni internazionali ha conosciuto una profonda evoluzione che riguarda aspetti sostanziali e procedurali delle misure adottate. In tale contesto, il volume Evoluzione ed attualità delle sanzioni ONU. Dalla Società delle

[1] Per gentile concessione dall'Osservatorio sul consiglio di sicurezza e i diritti umani n. 5/2019, ISSN 2284-3531, Ordine internazionale e diritti umani, (2019), pp. 1043-1048.

Nazioni alle odierne applicazioni per il mantenimento della pace analizza in modo puntuale le trasformazioni e l'aggiornamento continuo che tali misure hanno conosciuto nel corso degli anni per rispondere a due finalità principali: da un lato, la necessità di essere più efficaci e, dall'altro lato, di evitare gli "effetti collaterali" sulla popolazione che molte di queste misure producevano.

Il lavoro è frutto delle riflessioni del Convegno sul tema tenutosi il 30 gennaio 2019 presso il Palazzo dei Gruppi parlamentari della Camera dei Deputati, sotto la direzione scientifica del T. Col. Umberto Montuoro, e prende le mosse dall'analisi delle sanzioni comminate nei confronti dell'Italia a seguito dell'invasione dell'Etiopia nel 1935. La rilettura di tali avvenimenti, già abbondante in dottrina, avviene però attraverso una prospettiva nuova e integrata dallo studio di un carteggio, sino ad oggi classificato come riservato dal *Foreign Office* britannico, relativo ad una missione diplomatica segreta a Londra svolta, nel tentativo di avvicinare politicamente Italia e Regno Unito in un momento storico in cui le sanzioni erano già state adottate dal Consiglio della SdN, dal deputato Ezio Garibaldi, nipote del più noto Giuseppe Garibaldi.

La prima parte del volume è pertanto dedicata all'approfondimento del significato giuridico e politico delle sanzioni. Tale analisi riguarda il periodo storico che intercorre tra le due guerre mondiali e sottolinea la dimensione innovativa delle sanzioni, per i tempi, in quanto misure che limitano l'esercizio della forza nelle relazioni internazionali. La portata delle norme del Patto della SdN che riguardano la reazione a guerre ritenute illecite è pertanto rivoluzionaria anche se, come rileva Umberto Leanza, «attraverso una serie di interpretazioni forzate ed arbitrarie dei suoi contenuti, operate dal Consiglio e dall'Assemblea, l'articolo [16 del Patto] fu svuotato, quanto alle sanzioni militari, di qualsiasi contenuto obbligatorio, ritenendosi che ciascuno Stato fosse libero di parteciparvi o meno, e subì anche un notevole affievolimento quanto alle sanzioni economiche, sociali e finanziarie» (pp. 95-96).

Il caso emblematico resta quello del conflitto italo-etiopico. Le sanzioni nei confronti dell'Italia vennero adottate nel novembre 1935 attraverso tre provvedimenti: divieto alle importazioni dall'Italia, divieto di esportazione verso l'Italia di materie prime e di alcuni prodotti chiave, misure di reciproco appoggio tra gli Stati sanzionisti. L'Italia era preparata a questo tipo di reazione, peraltro affievolita dall'assenza dal sistema di Stati Uniti, Germania e Giappone e dalla dichiarata volontà di altri Stati, quali Spagna e Jugoslavia, di non applicare le sanzioni con estremo rigore.

È opportuno rilevare come tali sanzioni vennero adottate dal Consiglio della SdN all'unanimità, alla luce dell'impossibilità dell'Italia, benché membro permanente, di esprimersi al riguardo dovuta all'applicazione generale e senza eccezioni del principio *nemo iudex* in re sua. Al giorno d'oggi, l'adozione di sanzioni da parte del Consiglio di sicurezza dell'ONU nei confronti di un membro permanente non sarebbe possibile poiché il principio in questione trova applicazione soltanto alle risoluzioni adottate ai sensi del Cap. VI della Carta e, dunque, in uno scenario di questo tipo, il membro permanente potrebbe porre il veto sull'adozione della decisione.

Nel contesto della discussione circa un eventuale aggravio delle sanzioni nei confronti dell'Italia, tale da far rientrare il petrolio nelle materie prime vietate, si inserisce la missione a Londra dell'On. Ezio Garibaldi che, come sottolineato dal contributo di Anita Constance Garibaldi, nipote di Ezio, era la persona più adatta a farsi promotore delle richieste italiane presso gli inglesi. L'allora deputato era per metà inglese, figlio di Ricciotti e Constance, cresciuto in un ambiente familiare condito dalle frequentazioni del padre con figure quali Hoare e Churchill e, infine, formatosi come diplomatico grazie al precedente incarico di Ministro Plenipotenziario in Messico, conferitogli dal Capo di Governo nel 1922.

La missione a Londra di Garibaldi per incontrare Hoare e Vansittart, peraltro senza nessun incarico ufficiale, produce risultati positivi. Il contributo di Tito Rizzo sottolinea come, in seguito all'incontro tra Garibaldi e Hoare, il Sottosegretario agli Esteri Suvich scrisse al Capo del Governo *pro tempore* di «avere l'impressione di una favorevole disposizione degli inglesi a trattare, evidenziando i segni di benevolenza della Gran Bretagna anche nell'accoglienza fatta proprio a Garibaldi» (pp. 41-

42). In seguito all'incontro, inoltre, Hoare acconsentì al rinvio della seduta a Ginevra per le sanzioni inglesi contro l'Italia e iniziarono le trattative ufficiali che portarono, il 15 luglio 1936, all'abolizione delle sanzioni e al ritiro della flotta britannica nel Mediterraneo.

Come sottolinea Umberto Montuoro, la missione diplomatica di Garibaldi rivela interessanti profili di un significativo tentativo di avvicinamento tra Italia e Gran Bretagna e, probabilmente, consente una rilettura più consapevole delle relazioni tra i due Paesi, immediatamente prima dello scoppio della seconda guerra mondiale. Lo stesso autore rileva tuttavia che «[l]e attività di contatto e composizione dei complessi interessi presenti sul tappeto delle sanzioni, presso il governo britannico ebbe, sul piano strettamente tecnico, successo diplomatico ma l'orizzonte politico italiano di quegli anni non consentì un recepimento degli orientamenti di mediazione espressi dalla parte inglese. Dunque, non fu posta in essere la tanto auspicata correzione della linea di condotta nazionale in terra d'Africa» (p. 156).

Da questa rilettura, infine, emerge con forza la straordinaria fama del Gen. Giuseppe Garibaldi nell'Inghilterra vittoriana, quale premessa imprescindibile della missione del nipote Ezio, e il ruolo d'avanguardia dell' "eroe dei due mondi" nella promozione politica e ideale del diritto internazionale, in particolare dello strumento dell'arbitrato quale mezzo di soluzione pacifica delle controversie internazionali. Sin dagli anni Sessanta del XIX secolo, infatti, il Generale si era fatto promotore presso le cancellerie continentali della creazione di una confederazione europea in cui le divergenze tra gli Stati si sarebbero dovute risolvere attraverso arbitrati internazionali. Questo modello, nell'idea del Garibaldi, avrebbe gradualmente coinvolto tutti gli Stati della comunità internazionale in un processo di generale rifiuto dell'uso della forza per risolvere le controversie a favore dell'utilizzo di mezzi giudiziari.

3. L'evoluzione delle sanzioni nella comunità internazionale contemporanea

La seconda parte del volume si concentra invece sulle sanzioni nel diritto internazionale contemporaneo, partendo dalla distinzione, evidenziata da Natalino Ronzitti, tra sanzioni del Consiglio di sicurezza e contromisure unilaterali. Il contributo dell'autore evidenzia limiti ed efficacia di tali misure e si sofferma, giustamente, su un aspetto fondamentale: le sanzioni promosse dal Consiglio possono essere adottate in seguito ad un accertamento, ai sensi dell'art. 39 della Carta, oltre che di una violazione della pace o di atto di aggressione, anche di una minaccia alla pace (p. 61), considerando l'ampia discrezionalità, confermata dalla prassi, di cui gode il Consiglio di sicurezza nel qualificare una situazione quale minaccia alla pace (si veda S. MARCHISIO, Le Nazioni Unite e il mantenimento della pace e della sicurezza internazionale tra luci e ombre, in I. CARACCIOLO, U. MONTUORO (a cura di), L'evoluzione del peacekeeping. Il ruolo dell'Italia, Torino, 2017, pp. 35-50; R. CADIN, I presupposti dell'azione del Consiglio di sicurezza nell'articolo 39 della Carta delle Nazioni Unite, Milano, 2008).

Questa tipologia di sanzioni è utilizzata sia nei confronti di Stati, sia di attori non statali (quali gruppi terroristici) e di persone fisiche o giuridiche. Tali misure dovrebbero essere elaborate in modo tale da minimizzare le conseguenze negative per chi non è responsabile delle politiche o azioni che hanno portato all'adozione delle sanzioni, per ridurre al minimo gli effetti sulla popolazione civile locale e sulle attività legali svolte nello Stato oggetto di sanzioni. La differenza è sostanziale con le contromisure, le quali possono essere adottate solo dallo Stato leso contro lo Stato che ha violato il diritto internazionale, tenendo in considerazione che, secondo l'Autore, nel caso di violazione di una norma cogente, a tutela di valori fondamentali dell'intera comunità internazionale, tutti gli Stati sono lesi o comunque interessati dalla violazione (si veda N. RONZITTI (ed. by), *Coercive Diplomacy*, *Sanctions* and International Law, Boston/Leiden, 2016).

In modo complementare, il contributo di JILL MORRIS, ambasciatrice del Regno Unito in Italia, conferma come le sanzioni siano diventate uno strumento primario per rispondere a crisi, minacce e condotte illecite. Si tratta di strumenti in grado di produrre effetti tangibili e, dal punto di vista

politico, integrano il divario esistente nelle relazioni internazionali tra la mancanza di azione, che rischia di mandare un segnale implicito di approvazione, e il ricorso a misure militari in caso di legittima difesa o di autorizzazione all'uso della forza del Consiglio di sicurezza ex Cap. VII della Carta ONU (p. 50). È opportuno ricordare, tuttavia, che gli strumenti diplomatici e giudiziari internazionali a disposizione degli Stati, soprattutto in ambito Nazioni Unite, sono ormai un bagaglio acquisito di cui gli Stati possono disporre per risolvere le proprie controversie in modo pacifico, in linea con il principio consuetudinario della libertà della scelta dei mezzi di soluzione delle controversie, anche senza ricorrere a strumenti di coercizione quali possono essere le sanzioni (sui mezzi di soluzione delle controversie internazionali si veda S. MARCHISIO, Corso di diritto internazionale, 2° ed., Torino, 2017, pp. 375- 408).

L'Autrice ricorda che «le sanzioni, insieme agli strumenti di peacekeeping, alla diplomazia e agli aiuti, hanno fatto parte [e fanno parte tuttora] di quella serie di misure impiegate con successo sia dall'ONU che da altri attori internazionali per rispondere adeguatamente alle numerose situazioni di conflitti e post-conflitti». Allo stesso tempo, esistono anche limiti. La prima debolezza è rappresentata dalla difficoltà di adottare, nell'ambito del Consiglio di sicurezza, risoluzioni che richiedono l'assenza di voti contrari da parte dei membri permanenti con diritto di veto. La seconda fragilità è data dal fatto che l'efficacia delle sanzioni dipende dal soggetto che le adotta, come ha sottolineato il Segretario generale aggiunto per gli affari politici nel 2018 (pp. 53-54), per cui le misure adottate da grandi potenze economiche avranno, tendenzialmente, maggiori probabilità di produrre gli effetti desiderati.

Il successivo contributo di Mirko Sossai pone l'accento sull'evoluzione che lo strumento ha conosciuto, soprattutto negli ultimi trent'anni. In primis, vi è stato un processo di individualizzazione delle misure sanzionatorie, che riguarda non solo le persone fisiche ma anche quelle giuridiche. A questo, si è accompagnata la progressiva formalizzazione delle sanzioni, che hanno raggiunto un elevato grado di complessità giuridica e articolazione tecnica. In tal senso, sono individuabili tre profili: a) la tipizzazione in diverse categorie delle misure, in quanto è possibile rinvenire quattro categorie (congelamento dei beni, *travel bans*, embargo di armi, limitazioni all'importazione e all'esportazione di beni di lusso); b) l'interpretazione delle risoluzioni del Consiglio di sicurezza che adottano sanzioni, dato che non è chiaro, a parere dell'autore, se tali atti si debbano interpretare utilizzando le regole generali sull'interpretazione dei trattati internazionali; c) l'evoluzione delle procedure che includono i procedimenti per rimediare all'eventuale violazione di diritti fondamentali e consentono la possibile cancellazione di una entità dalle *black lists* (pp. 145-150), quale eredità della celebre vicenda Kadi (sul punto si veda R. CADIN, La saga Kadi e la ricerca della quadratura del cerchio nell'ambito dei sistemi multilivello: l'approccio sistematico nella recente giurisprudenza delle corti europee, in L. PANELLA (a cura di), I diritti umani nella giurisprudenza e nella prassi del diritto internazionale ed europeo, Torino, 2013, pp. 211-234).

La disamina si conclude, in un'appropriata prospettiva multilivello, evidenziando i riflessi del ricorso a sanzioni e contromisure internazionali nell'ordinamento italiano, inclusa la necessità di dare ad esse attuazione sul piano interno attraverso la predisposizione delle cosiddette "sanzioni secondarie". A tale proposito, Antonino Intelisano rileva come «la violazione delle norme impeditive o restrittive adottate comporta effetti sulla validità delle transazioni commerciali sia nel loro momento genetico sia nella durata dei rapporti già instaurati». In relazione ai contratti in corso di esecuzione si configura, infatti, l'impossibilità sopravvenuta dell'esecuzione contrattuale» (pp. 81-82).

4. Riflessioni conclusive

Il volume rappresenta un'opera che, al di là della dichiarata finalità divulgativa, sistematizza la prassi corrente delle sanzioni adottate nell'ambito del Consiglio di sicurezza, per dimostrare come tali misure siano profondamente diverse, non solo (ovviamente) rispetto a quelle adottate

nell'ambito della Società delle Nazioni e, in particolare, nel caso del conflitto italo-etiope, ma anche da quelle adottate dallo stesso Consiglio di sicurezza negli anni Novanta del secolo scorso, come nel caso dell'embargo economico generale imposto all'Iraq (e soprattutto alla sua già martoriata popolazione civile) in seguito all'invasione del Kuwait. Le attuali sanzioni presentano, infatti, caratteri tipizzati e individualizzati (basti pensare alle c.d. *smart sanctions*) e sono, o almeno mirano ad essere, rispettose dei diritti fondamentali, sia con riguardo alla riduzione dei danni collaterali verso la popolazione civile, che in relazione alla figura dell'Ombudsman, introdotta in alcuni di questi regimi sanzionatori con finalità garantiste.

Last but not least, grazie all'analisi del desecretato carteggio tra Italia e Gran Bretagna relativo alla missione diplomatica dell'On. Ezio Garibaldi, il volume offre importanti elementi per una rilettura storica delle relazioni internazionali in Europa nel periodo tra le due guerre mondiali e mette in luce l'importanza della figura spesso sottovalutata del nipote del più celebre Giuseppe.

Gianfranco Gabriele Nucera

Chiuso in redazione

nel mese di luglio 2022

MINISTERO DELLA DIFESA

Giustizia Militare

Rassegna della Giustizia Militare